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THE  
**INDIAN EVIDENCE ACT,** *†*  
**No. I OF 1872,**  
**AS AMENDED BY ACT No. XVIII OF 1872,**  
TOGETHER WITH AN  
Introduction and Explanatory Notes, Filings of  
the Courts, and Index.

BY  
**TARAPADA BANERJI, B.L.,**  
*Vakil, High Court, Calcutta,*  
**KRISHNAGHUR.**



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## DEDICATION.

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THIS work is respectfully dedicated to Prossunno Kumar Bose, Esq., M.A., B.L., as a testimony of the author's most affectionate regard inspired by his many sterling qualities, and also in acknowledgment of valuable assistance in the compilation of this work, by his ever grateful and admiring pupil

THE AUTHOR.

KRISHNAGHUR, }  
*The 21st December 1896.* }



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## INTRODUCTION.

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**History of the Law of Evidence in India before 1872.**—There was no Law of Evidence in the proper sense of the word, when the English first undertook the systematic administration of this country. Neither Manu and his Brahminical commentators, nor the Mahomedan Moulavis laid down any definite rules regarding the admission and rejection of evidence. Our rulers, being conscious of their ignorance of the manners and customs of the people of this country, did not, for some time, venture to lay down any positive rules relating to this important branch of law, for the guidance of our Law Courts. The Judges were left to themselves. They administered justice according to their individual ideas of equity and moulded their practice by what they thought to be principles of substantial justice. But being mostly foreigners, they were, as a rule, bad Judges of what was expedient for us, and, possibly, not very good Judges of what was just and equitable. They thought that the infusion of English principles was highly desirable, and decided Indian cases by analogies drawn from the experience of Western civilization, and the feelings of European society. They did not take care to view our customs and juridical notions in their true light, and could never fully realise the truth of the saying that a country should be governed in conformity with its own notion and customs. They did not admit the necessity for preserving a tenderness and sympathy for native ideas and notions, some of which, to the European mind, might seem absurd. The usages of Eastern and Western Society are not parallel. What may be regarded as innocent in one community may, in another, be suggestive of guilt. Moreover, there is an inherent difficulty of applying the English Law of Evidence to foreign system of judicial administration. Therefore the attempt of our Judges to decide questions of evidence by reference to English rules oftentimes resulted in miscarriage of justice. Our rulers, however, in course of time, saw the difficulty of their position. They felt that a body of fixed rules of evidence was of extreme importance for



the proper administration of justice. In the absence of any direct legislation, the common and statute law, which prevailed in England before 1726, was introduced in the Presidency-towns by the Charter Act of 1833 ; but for Courts, not established by Royal Charter, no complete rules of evidence were ever laid down or introduced by authority before the passing of Act II of 1855. In England, Mr. Bentham pointed out what reforms the common and statute law needed. Lords Denman, Brougham and others introduced those reforms. The 3 and 4 Will. IV Cap. 92 removed the restrictions as to interested witnesses ; the 6 and 7 Vic. Cap. 85 laid down that no witness should be excluded from giving evidence by reason of incapacity from crime or interest ; the provisions of the 9 and 10 Vic. Cap. 95 declared parties to the proceeding and their wives competent witnesses in the County Courts, and the 14 and 15 Vic. Cap. 99 made such persons competent to give evidence in any Court of Justice, or before any persons having, by law or by consent of parties, authority to hear, receive and examine evidence. The Legislature of this country introduced similar reforms by the provisions of Act XIX of 1837, Act IX of 1840, Act VII of 1844, Act XV of 1852, and Act II of 1855. Of these Acts, Act II of 1855 was the most important. It contained many valuable provisions, but it was evidently designed not as a complete body of rules, but as supplementary to and corrective of the English law, and also of the customary Law of Evidence prevailing in those parts of British India, where the English law was not expressly administered. In the words of Mr. Field, " the whole of the Indian Law of Evidence, as it existed before the introduction of the Act of 1872, might have been divided into three portions, *viz.*, one portion *settled* by the express enactments of the Legislature, a second portion *settled* by judicial decisions, and a third or *unsettled* portion, and this by far the largest of the three, which remained to be incorporated with either of preceding portions." Such being the state of the most important branch of Adjective Law, formal legislation was considered necessary, and in the year 1868 the Indian Law Commissioners drew a Draft Evidence Act, which was sent out to this country, and was introduced and referred to a Select Committee by Sir H. S. Maine. But the Bill was pronounced to be unsuitable to the wants of the people, and a

new Bill was framed by Sir J. F. Stephen, and passed into law in the year 1872.

**The Indian Evidence Act of 1872.**—In the years 1870 and 1871, Sir J. F. Stephen drew up what afterwards became law in 1872. "The Evidence Act is little more than an attempt to reduce the English Law of Evidence to the form of express propositions arranged in their natural order, with some modifications rendered necessary by the peculiar circumstances of India."\* Sir J. F. Stephen has, with unrivalled skill, compressed, within the compass of 167 sections, the whole of Taylor's Law of Evidence consisting of some two thousand pages of solid matter. He has made a laborious attempt to adopt an exotic system of legal rules which have been brought into existence by a highly artificial process of evolution from a body of abstract principles of the widest application. It is no doubt the peculiar glory of the English Law of Evidence, that its doctrines are based on ancient experience, on the wisdom of a long succession of learned Judges, and precedents which have left their mark on the history of the country; but it was brought into existence for a community extremely dissimilar to the natives of this country. Its rules have been matured and framed by special reference to English character and custom. It may, therefore, be remarked as Sir H. S. Maine has very justly observed that "it is quite possible to hold a respectful opinion of many parts of English law, and yet to affirm strongly that its introduction by Courts of Justice into India has amounted to a grievous wrong." It is an undeniable fact that Western ideas are making their way into our country, and a disintegration of our usages and thoughts is being gradually effected; but we, as a nation, still cling with our characteristic tenacity to our old usages and customs, and our rulers, notwithstanding their strenuous and persistent efforts to metamorphose them by the infusion of foreign modes of thought, have not, as yet, been wholly successful in their attempt. The introduction, therefore, of doctrines developed in the way the doctrines of the English Law of Evidence have done is, to say the least, highly inexpedient. The *dicta* of English law, or even the most elaborate English decisions, ought never to be allowed to rule imperatively

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\* *Vide* Stephen's Introduction to the Evidence Act.

our Judges on all points in the discharge of their duties; because they deal with a society very different from any European society. But as the principles of our Evidence Act have been chiefly borrowed from the English law, the Act can hardly be properly understood without reference to English text-books and decided cases. We should, however, bear in mind that as we have now an express legislative enactment, we must not look, in the first instance, to English rules for the solution of our difficulties. We must refer to the Act itself, and in respect of matters, expressly provided for in the Act, we must, so to say, start from it, and not deal with it as a mere modification of the English Law of Evidence. It is inconsistent with the plan of an express enactment that a specific rule contained in it should be attempted to be explained by a reference not to the enactment itself, but to the rules from which it may have been deduced or is deducible, and no tribunal ought to sanction any laxity which involves a violation of rules expressly laid down. In the case of *The Collector of Gorakhpur v. Palakdhari Singh*, I. L. R. 12 All. (F. B). 1, Straight J. said : "I may premise by saying that, although the argument of this point before the Full Bench took a much wider scope, it seems to me that the decision of it must be looked for and found in the Evidence Act in force in this country, and that we really have nothing to do with the principles of the English or of any other law, which might apply if that Act were not in force and binding on us. We must take that Act as we find it, and none the less give effect to it, because, upon a rational and ordinary construction of its provisions according to well-recognised rules of interpreting statutes, they appear to sanction something which Courts in England or other systems of law would not permit, or to depart from principles adopted by those Courts or the Courts of other countries." Cases do, however, arise for which no positive solution can be found in the Act, and in such cases, it is always safe to adopt English rules in so far as they follow or are in accord with the general lines of the Act. There can be no denying the fact that English cases are of great assistance in construing the Acts of Indian Legislature, where the statutes are *pari materia*. The author has, therefore, unhesitatingly referred to English decisions and text-books, to

elucidate the meaning of the Act, where the cases decided by the Law Courts of this country have been of little or no avail to him.

Although twenty-four years have elapsed since the Act was passed, and the Code has been fully interpreted by the highest tribunals of the land, and annotated by very many learned commentators, still the majority of the practitioners and Judges of the country betray a sadly imperfect acquaintance with its principles. In the case of *Phulkar v. Subjan Pande*, I. L. R. 4 All. 249, Stuart C. J. very justly remarked that "in fact taking and recording evidence is a judicial duty, which, in these provinces, is performed in a manner which, to say the least, is most perfunctory, so much so as to make the so-called depositions in many, if not in most cases, utterly useless for the purposes of justice. The want of skill in this respect is specially and sadly observable in Native Judges, who seem altogether unacquainted with the manner in which witnesses should be examined. A witness's cause of knowledge of the facts to which he deposes is scarcely ever known, and it is not too much to say that nine-tenths of the depositions, which are brought before us, scarcely contain a single word of evidence properly so called . . . Even in this High Court pleaders of eminence and of undoubted ability and learning are often seen to read and to argue with all the composure of the most serious advocacy on the miserable contents of such worthless documents. In fact many judicial officers and pleaders, certainly those in the districts, seem utterly ignorant on the subject of evidence." Such remarks may even now be made with equal appropriateness. This lamentable state of things is due partly to the want of proper legal training of our lawyers and Judges and partly to the unsuitability of the law itself. It is therefore proposed to give an outline of the plan of the Act, and of the method which has been adopted in it, that the student may have little difficulty in understanding this important branch of law.

**Its plan and method.**—The Indian Evidence Act embodies the results of the experience of ages in a very careful and methodical manner. Its arrangement and method of statement are its distinctive characteristics, being affirmative in their nature. Its phraseology is of peculiar value, as it aims at providing a

safeguard against inconsistent and opposite conclusions, by avoiding certain ambiguous and double-meaning expressions, which have been engrafted upon some of the fundamental principles of the English Law of Evidence. The expression 'hearsay is no evidence,' being very vague and susceptible of different meanings, has been carefully avoided in the Act. The expression 'circumstantial evidence' has also been avoided for similar reasons. By this improvement in the phraseology much obscurity, which is to be found in the ordinary English treatises, has been removed, and the rules of law have been set forth in clearer light. The wisdom and sagacity of the framer of the Code may be sufficiently understood if the student of law would carefully peruse his 'Introduction to the Evidence Act,' in which he propounds a theory of judicial evidence which, says Sir H. S. Maine, "seems to me more nearly correct than any hitherto given to the world by a lawyer." The English text-books on the Law of Evidence represent the law as a system of exclusion, but our Code keeps the rules of exclusion in the back ground, and sets forth the dominant rules in an affirmative manner. The Act is divided into two principal divisions. The first division deals with the relevancy of facts. It begins by declaring that evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others. 'It then lays down what are relevant facts. In the first place, it says that evidence of the actual facts in issue is admissible. In the second place, it lays down the forms of connection which must exist between two facts in order that the one may be taken into account for forming a belief about the other.' One fact is relevant to another fact when the existence of the one can be shown to be the cause or one of the causes, or the effect or one of the effects, of the existence of the other, or when the existence of the one, either alone or together with other facts, renders the existence of the other highly probable or improbable according to the common course of events.\* Sir F. J. Stephen has arranged relevant facts under five headings, viz., I, Acts and events (secs. 1—16); II, Statements (secs. 17—39); III, Decrees, judgment and orders

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\* *Vide* Stephen's Digest of the Law of Evidence.

(secs. 40—44); IV, Opinions (secs. 45—50); V, Character and reputation (secs. 52—55).

Under the heading of facts and events are classed (1) facts forming part of the same transaction (sec. 6); (2) facts which are the occasion, cause or effect of facts in issue (sec. 7); (3) facts which show or constitute a motive or preparation, as also the previous or subsequent conduct of parties (sec. 8); (4) facts necessary to explain or introduce relevant facts (sec. 9); (5) things said or done by conspirator in reference to common design (sec. 10); (6) facts inconsistent with any fact in issue or relevant fact, and facts which make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable (sec. 11); (7) facts which enable the Court to determine the amount of damages (sec. 12); (8) facts showing the existence of any right or custom (sec. 13); (9) facts showing existence of state of mind or of body or bodily feeling (sec. 14); (10) facts bearing on question whether an act was accidental or intentional (sec. 15); (11) facts showing the existence of any course of business (sec. 16).

The next class of relevant facts are certain statements. They are (1) admissions (secs. 17—23, and 31); (2) confessions (secs. 24—30); (3) statements by persons who cannot be called as witnesses (secs. 32—33); (4) statements made under special circumstances (secs. 34—38).

The third class of relevant facts are judgments, decrees and orders of the Courts of Law (secs. 40—44). Sec. 40 makes previous judgments relevant to bar a second suit or trial, such judgments must be judgments *inter partes*. Sec. 41 deals with those judgments which are called judgments *in rem*. They operate not only as against the parties to the suit, but as against all the world. Section 42 makes judgments, other than those mentioned in sec. 41, relevant, if they relate to matters of a public nature relevant to the enquiry.

The fourth class of relevant facts are opinions of experts, and of persons possessing special means of information. Opinions of experts are relevant when the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting (sec. 45). The opinion of a person

possessing special means of information is relevant when the Court has to form an opinion as to the person by whom any document was written or signed (sec. 47), as to the existence of any general custom or right (sec. 48), as to the usages and tenets of any body of men or family, &c., as to constitution and government of any religious or charitable foundation, as to meaning of words or terms used in particular classes of people (sec. 49), and as to the relationship of one person to another (sec. 50). Facts bearing upon opinions of experts are relevant under sec. 46, and the grounds on which opinions are based are relevant under sec. 51.

The last class of relevant facts is character and reputation of parties. In civil enquiries, no evidence of character is relevant to make the conduct imputed to a party probable or improbable (sec. 52), such evidence is relevant only as affecting damages (sec. 55). In criminal enquiries the case is different. Sec. 53 makes evidence of good character relevant in such enquiries. Sec. 54 lays down when evidence of previous bad character is relevant.

This may be called the substantive part of the Law of Evidence, as it enumerates the materials which may be relied upon in every judicial enquiry. The next or formal part of the law is concerned with the manner in which facts, which are relevant under the sections mentioned above, are to be proved. Part II of the Act deals with the general principles governing 'proof.' Part III treats of the production and effect of evidence.

In treating of the subject of 'proof,' the framer of the Code first mentions the two classes of facts which need not be proved, viz., (1) facts of which the Court will take judicial notice, such facts are enumerated in sec. 57; (2) facts which have been admitted or which the parties have agreed to admit (sec. 58). Besides the two kinds of facts mentioned above, all other facts need be proved by legal evidence. The Code then lays down two general rules of law, viz., that (1) all facts, except the contents of documents, may be proved by oral evidence (sec. 59), and that (2) oral evidence must, in all cases whatever, be direct, that is to say (a) if it refers to fact which could be seen, it must be the evidence of a witness who says he saw it;



(b) if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it; (c) if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner; (d) if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds (sec. 60). An exception to the rule about opinion, evidence is made in favour of experts, whose opinions are expressed in treatises commonly offered for sale, when such experts are dead or cannot be found, or have become incapable of giving evidence, or, if to call them as witnesses, it would involve unreasonable delay or expense, then such treatises may be produced as evidence of such opinions, and of the grounds on which they are based (sec. 60). Sec. 60 also provides that if oral evidence refers to the existence or condition of any material thing other than a document, the Court may require it to be produced for inspection.

The Code then, in Chapter V, deals with documentary evidence. The general rule is that documents may be proved either by primary or by secondary evidence. Primary evidence means the document itself (sec. 62), secondary evidence is of five different descriptions, *viz.*, (a) certified copies, (b) copies made from the original by mechanical processes, and copies compared with such copies; (c) copies made from or compared with the original; (d) counter-parts of documents as against the parties who did not execute them; (e) oral accounts of the contents of a document given by some person who has himself seen it (sec. 63). Sec. 64 lays down the rule that documents must be proved by primary evidence except in the following cases: (a) when the original is in the power or possession of the opposite party, or of any person out of the reach of, or not liable to the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in sec. 66, such person does not produce it, in this case any secondary evidence of the contents is admissible; (b) when the existence or contents of the original are proved to have been admitted in writing by the person against whom it is to be proved or his representative in interest, in this case the

written admission only is admissible; (c) when the original has been lost or destroyed or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time, in this case any secondary evidence is admissible; (d) when the original is of such a nature as not to be easily moveable, in this case also any secondary evidence is admissible; (e) when the original is a public document within the meaning of sec. 74, in this case only a certified copy of the document is admissible; (f) when the original is a document of which a certified copy is permitted to be given in evidence, in this case also only a certified copy of the documents is admissible; (g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection, here the result may be proved by any person skilled in the examination of such documents, who has examined them (sec. 65). The provisions as to the proof of handwriting and signatures, where a document is alleged to have been written or signed by a particular person, and as to proof of attestation when document is required by law to be attested, are contained in secs. 67—73. Sec. 74 enumerates public documents. Sec. 76 gives a definition of a certified copy. Secs. 77 and 78 say how public documents are to be proved, then follow the provisions regarding the presumptions as to genuineness of certified copies (sec. 79), of documents produced as record of evidence or statement or confession by any prisoner or accused person (sec. 80), of gazettes, newspapers, private Acts of Parliament, and other documents purporting to be documents directed by any law to be kept by any person (sec. 81), of documents admissible in England without proof of seal or signature (sec. 82), of maps or plans made by authority of Government (sec. 83), of collections of laws and reports of decisions (sec. 84), of powers-of-attorney (sec. 85), of certified copies of foreign judicial records (sec. 86), of any book to which the Court may refer on a matter of public or general interest, and any published chart or map produced for its inspection (sec. 87), of telegraphic messages (sec. 88), of documents called for and not produced after notice to produce (sec. 89), and of documents thirty years old, and produced

from proper custody (sec. 90). Secs. 79—85 and 89 provide for cases in which the Court shall presume certain things about the documents mentioned in them. Secs. 86, 87, 88 and 90 provide for cases in which the Court *may* presume certain things about them. Chapter VI lays down the rules regarding the exclusion of oral by documentary evidence. Sec. 91 broadly lays down that when the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no derivative and consequently no verbal or other parol evidence of their consents is receivable, until the absence of the original writing is accounted for. The writing itself is not only the best, but is the only admissible evidence of the matter which it contains. This rule is subject to two exceptions. Exception 1—When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved. Exception 2—Wills admitted to probate in British India may be proved by the probate. The second rule is that in any such case no evidence of any contemporaneous oral agreement or statement shall be admitted as between the parties to the document or their representatives, for the purpose of contradicting, varying, adding to, or subtracting from, its term. There are six important provisos to this rule, which modify it to a considerable extent. They are the following :—(1) Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto ; (2) The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms may be proved ; (3) The existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under the document may be proved ; (4) A subsequent oral agreement to modify or reverse the original contract may be proved, except when it is obliged by law to be in writing, or has been duly registered ; (5) Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved ; (6) Any fact may be proved which

shows in what manner the language of a document is related to existing facts. The rules as to the admissibility of extraneous evidence for the purpose of interpreting documents are contained in secs. 93—100. They may be stated as follows: (1) When the language is on its face ambiguous or defective, no extraneous evidence is allowed to remedy the defects (sec. 93); (2) When language is plain in itself and applies accurately to existing facts, evidence cannot be given to show that it was intended to apply to other facts (sec. 94); (3) When language is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense (sec. 95); (4) When language would apply equally well to several persons or things, but could not have been intended to apply to more than one of them, evidence may be given to show, to which of those persons or things it was intended to apply (sec. 96); (5) When the language used applies partly to one set of existing facts and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply (sec. 97); (6) Evidence may be given to show the meaning of illegible or not commonly intelligible characters of foreign, obsolete, technical, local and provincial expressions, of abbreviations and of words used in a peculiar sense. These rules of construction do not apply to documents which are governed by the Indian Succession Act (sec. 100).

The third part of the Evidence Act deals with the subject of production and effect of evidence, and is divided into five chapters. Chapter VII, which relates to the burden of proof, deals with the subject of presumptions. The general principles which regulate the burden of proof are laid down in secs. 101—106. Sec. 101 asserts that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. The next section supplies a test for the purpose of ascertaining on whom the burden of proof lies. It says that the burden of proof lies on that person who would fail if no evidence at all were given on either side. Sec. 103 says that when a person wishes the Court to believe in the existence of any particular fact, he should prove it. Sec. 104 provides that the burden of

proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence. Sec. 105 relieves the prosecution from the necessity of proving the absence of circumstances which might constitute a general or special exception under the Indian Penal Code or any other law defining an offence. It is incumbent on the accused to prove the existence of circumstances which would show that the exceptive clause takes his case out of the danger of the law. Sec. 106 says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

The Code next enumerates the cases in which the burden of proof is determined in particular cases, not by the relation of the parties to the cause, but by presumptions (secs. 107—111). If a man is shown to have been alive within thirty years, the burden of proving that he is dead lies on the person affirming it (sec. 107); if a person has not been heard of for seven years, the burden of proving that he is alive is on the person who affirms it (sec. 108); when people are shown to have stood in the relation of partners, landlord and tenant, principal and agent, the burden of proving that they do not stand or have ceased to stand to each other in those relationships respectively is on the person who affirms it (sec. 109); when a man is in possession of anything, the burden of proving him not to be the owner lies on the person asserting that he is not the owner (sec. 110); the burden of proving the good faith of transactions between parties, one of whom stands to the other in a position of active confidence, is on the party who is in a position of active confidence (sec. 111). The law then notices two cases of conclusive presumptions, the presumption of legitimacy from birth during marriage (sec. 112), and the presumption of a valid cession of territory from the publication of a notification to that effect in the *Gazette of India* (sec. 113). Finally, it declares, in sec. 114, that the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case. A large number of presumptions, to which the English text-books give an artificial value, are treated as mere

maxims, and the Court is given a very wide discretion to apply them to the facts before it, and draw whatever inferences it thinks just.

Next comes the subject of estoppels. The English law divides estoppels into three kinds, namely, 1st—By matter of record ; 2nd—By deed ; 3rd—*In pais*. Chapter VIII is concerned with estoppels of the last class only. The definition of estoppel given in sec. 115 is not an exhaustive one. The section says that when one person, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true, and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing. The next section says that tenant shall not, during the continuancy of the tenancy, be permitted to deny that the landlord had a title at the beginning of the tenancy, nor shall any person, who came upon any immoveable property by the license of the person in possession thereof, be permitted to deny that such person had a title to such possession at the time when the license was given. Sec. 117 says that no acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw such bill or to endorse it, nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or license commenced, authority to make such bailment, or grant such license.

The Act then lays down the rules governing the examination of witnesses. Chapter IX speaks of witnesses. Sec. 118 specifies who may testify ; sec. 119 says how evidence of dumb witnesses may be taken ; sec. 120 says that parties to all civil and criminal proceedings are competent witnesses ; sec. 121 says that Judges and Magistrates are not compelled to answer any questions as to their conduct in Court as Judges and Magistrates, but they may be examined as to other matters which occurred in their presence whilst they were so acting. Sec. 133 makes an accomplice a competent witness. Last of all, it is provided by sec. 134 that no particular number of witnesses shall, in any case, be required for the proof of any fact.

In the same chapter provisions are made for the protection of certain communications. Communications made during

marriage are privileged (sec. 122); no evidence should be given of affairs of state without the permission of the officer at the head of the department (sec. 123); no official communications should be disclosed (sec. 124); no Magistrate or police-officer is bound to say whence he got any information as to the commission of any offence (sec. 125); professional communications made to legal advisers are not to be disclosed (sec. 126); interpreters and the clerks or servants of legal advisers are also bound not to disclose professional communications (sec. 127); sec. 128 says that the privilege is not waived by the client by giving evidence; sec. 129 says that the privilege is waived only when the client offers himself as a witness. Secs. 130 and 131 give to a witness the right to refuse the production of his title-deeds. Sec. 132 embodies a rule of law which is wider than what prevails in England. It lays down that a witness would not be excused from answering criminating questions if they relate to matters relevant to the matter in issue.

We come next to the mode in which witnesses are to be examined. The Act says that the order of production of witnesses shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and in the absence of any such law by the discretion of the Court (sec. 135). It then lays down the very important rule that all questions of admissibility of evidence should be decided by the Judge (sec. 136).

The examination of a witness by the party who calls him shall be called his examination-in-chief. His examination by the opposite party shall be called his cross-examination, and his examination subsequent to his cross-examination by the party who called him shall be called his re-examination. Only such questions as relate to relevant facts may be asked in such examinations, but the re-examination must be directed to the explanation of matters referred to in cross-examination (sec. 138). Sec. 141 gives the definition of a leading question. Such questions should not be asked in examination-in-chief or in re-examination as of right, but they may be asked in cross-examination (secs. 141—143). A witness should not be asked to make any statements as to matters in writing, if objected to by the opposite party (sec. 144). Sec. 145 lays down the rule of cross-examining

a witness as to his previous statements in writing without showing the writing to him, but it says that if it is intended to contradict him by such writing, the attention of the witness must be drawn to it, before such writing can be proved. Then reference is made to the class of questions which are asked only for the purpose of testing, impugning or confirming the veracity of a witness. Sec. 146 says that a witness may be asked in cross-examination questions which tend (1) to test his veracity, (2) to discover who he is and what is his position in life, or (3) to shake his credit, by injuring his character. When questions are put with a view to injuring the character of a witness, a discretion is given to the Judge either to allow or disallow such questions (sec. 148). Such questions should not be asked without reasonable grounds (sec. 149). Indecent and scandalous questions should not be asked, unless they relate to facts in issue (sec. 151), nor should insulting and annoying questions be put (sec. 152). Sec. 153 excludes evidence to contradict answers to questions testing veracity. Witnesses sometimes turn hostile to the party calling them, therefore the Court is given the discretion to permit the party calling such witnesses to put any questions to them which might be put in cross-examination by the adverse party (sec. 154). Sec. 155 says that the credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him: (1) by evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit; (2) by proof that a witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence; (3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted; (4) when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character. Secs. 156 and 157 provide for corroborating a witness by asking him about circumstances, other than those to which he speaks, and by proving his previous statements relating to the same fact. Sec. 158 says that statements relevant under secs. 32 and 33 may be corroborated or contradicted in the manner the statements of witnesses deposing before the Court may be corroborated or contradicted. Secs. 159



and 160 contain provisions for a witness's refreshing his memory by referring to certain writing, and sec. 161 gives the opposite party right to inspect such writing and to cross-examine the witness thereupon. If a witness be summoned to produce any document, he must bring it to Court, and if he has any objection to its production, the Court is to decide it (sec. 162). If a party calls for a document from the opposite party and inspects it after production, he is bound to give it as evidence, if the party producing it requires him to do so (sec. 163). If a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court (sec. 164). The provisions of the next section are not in accordance with English ideas. The section gives power to the Judge to ask any question at any time of any witness about any fact relevant or irrelevant for the purpose of discovering or obtaining proof of relevant facts, and to order the production of any document or order. Sec. 166 gives the jury and assessors power to put questions to the witnesses, through or by leave of the Judge. The Act concludes with the provision to the effect that improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised, that independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

As the Law of Evidence deals with the problems of judicial investigation and sets forth the principles upon which, and the methods by which, such problems can be successfully solved, we have given above a general outline of the plan of the Indian Evidence Act. For the proper understanding of this plan, it is necessary for the student of law to read carefully the remarks of Sir J. F. Stephen on the general distribution of the subject of evidence contained in Chapter I of his work entitled "An introduction to the Indian Evidence Act." He says: "Thus, in general terms, the Law of Evidence consists of provisions upon the following subjects:—

- (1) The relevancy of facts ;

- (2) The proof of facts ;
- (3) The production of proof of relevant facts.

“The matter must, however, be carried further. The three general heads may be distributed more particularly as follows :—

**“I. The Relevancy of Facts.**—Facts may be related to rights and liabilities in one of two ways—

“(1) They may by themselves, or in connection with other facts, constitute such a state of things that the existence of the disputed right or liability would be a legal inference from them. From the fact that A is the eldest son of B, there arises of necessity the inference that A is by the law of England the heir-at-law of B, and that he has such rights as that status involves. From the fact that A caused the death of B under certain circumstances, and with a certain intention or knowledge, there arises of necessity the inference that A murdered B, and is liable to the punishment provided by law for murder.

“Facts thus related to a proceeding may be called facts in issue, unless their existence is undisputed.

“(2) Facts, which are not themselves in issue in the sense above explained, may affect the probability of the existence of facts in issue, and be used as the foundation of inference respecting them, such facts are described in the Evidence Act as relevant facts.

“All the facts with which it can be, in any event, necessary for Courts of Justice to concern themselves are included in these two classes.

“The first great question, therefore, which the Law of Evidence should decide, is what facts are relevant . . . .

“What facts are in issue in particular cases is a question to be determined by the substantive law, or in some instances by that branch of the law of procedure, which regulates the forms of pleading, civil or criminal.

**“II. The Proof of Relevant Facts.**—Whether an alleged fact is a fact in issue or a relevant fact, the Court can draw no inference from its existence till it believes it to exist, and it is obvious that the belief of the Court in the existence of a

given fact ought to proceed upon grounds altogether independent of the relation of the fact to the object and nature of proceeding in which its existence is to be determined. The question is whether A wrote a letter. The letter may have contained the terms of a contract. It may have been a libel. It may have constituted the motive for the commission of a crime by B. It may supply proof of an *alibi* in favour of A. It may be an admission or a confession of crime, but whatever may be the relation of the fact to the proceeding, the Court cannot act upon it, unless it believes that A did write the letter, and that belief must obviously be produced, in each of the cases mentioned, by the same or similar means. If the Court requires the production of the original when the writing of the letter is a crime, there can be no reason why it should be satisfied with a copy when the writing of the letter is a motive for a crime. In short, the way in which a fact should be proved depends on the nature of the fact, and not on the relation of the fact to the proceeding.

"Some facts are too notorious to require any proof at all, and of these the Court will take judicial notice; but if a fact does require proof, the instrument by which the Court must be convinced of it is evidence, by which, I mean, the actual words uttered, or document, or other things actually produced in Court, and not the facts which the Court considers to be proved by those words and documents. Evidence in this sense of the word must be either (1) oral or (2) documentary. A third class might be formed of things produced to Court, not being documents, such as the instruments with which a crime was committed, or the property to which damage had been done, but this division would introduce needless intricacy into the matter. The reason for distinguishing between oral and documentary evidence is that in many cases the existence of the latter excludes the employment of the former, but the condition of material things, other than documents, is usually proved by oral evidence, so that there is no occasion to distinguish between oral and material evidence.

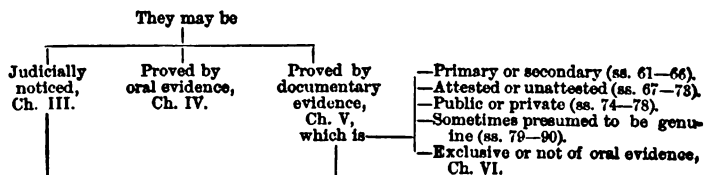
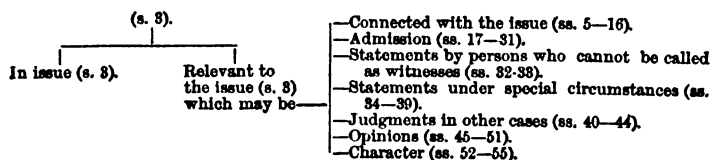
"It may be said that in strictness all evidence is oral, as documents or other material things must be identified by oral evidence before the Court can take notice of them. It is

unnecessary to discuss the justice of this criticism, the phrase 'documentary evidence' is not ambiguous, and is convenient and in common use. The only reason for avoiding the use of the word evidence in the general sense in which most writers use it is that it leads, in practice, to confusion, as has been already pointed out.

**"III. The Production of Proof.**—This includes the subject of the burden of proof; the rules upon which answer the questions,—By whom is proof to be given? The subject of witnesses—the rules upon which answer the questions, who is to give evidence, and under what conditions? The subject of the examination of witnesses—the rules upon which answer the questions,—How are the witnesses to be examined, and how is their evidence to be tested? Lastly, the effect upon the subsequent proceedings of mistakes in the reception and rejection of evidence may be included under this head.

"The following tabular scheme of the subject may be an assistance to the reader. The figures refer to the sections of the Act, which treat of the matter referred to :—

The object of legal proceedings is the determination of rights and liabilities which depend on facts



This proof must be produced by the party on whom the burden of proof rests (Ch. VIII), unless he is estopped (Ch. VIII).

If given by witnesses (Ch. IX), they must testify, subject to rules as to examination (Ch. X). Consequence of mistakes defined, Ch. XI.

“What has been said above explains with sufficient clearness the principles which have been followed in framing the Act. These principles have been adopted as guides to action, after prolonged experience and varied discussion, as they have been found to be extremely valuable as tests of truth. They help to produce in the judicial mind a reasonable belief as to existence or non-existence of certain facts, on which the rights or liabilities of the parties and the decision of the case depend. They enable the Judge to select the materials out of which belief is to be formed, and point out the mode in which the materials of belief are to be presented before the mind's eye for consideration. But however valuable these rules of evidence may be, they do not help the Judge on certain branches of judicial inquiry. One of the most difficult functions of a Judge is to decide on the accuracy and truthfulness of the witnesses who are the legal *media*, through whom the materials of belief are presented to his mind. The Act does not affect to provide him with rules to guide him in ascertaining whether a witness was deceived or not as to what his senses told him, whether he accurately remembered or not what he saw, and whether he is telling truth in his evidence before the Court. A proper solution of such questions is of great practical importance in every judicial proceeding whatever; and here the Judge must be guided by his own good sense and judgment, and by the results of close observation of human nature and conduct.\*

“For the reasons mentioned above, the author has thought it desirable to publish an edition of this most important Act of the Legislature with copious notes, showing the scope and purport of the more difficult sections, the reason of the rules embodied in them, and the interpretations which have been put on them by the Highest Courts of Judicature. Special care has been taken to make the notes full, accurate and trustworthy. The principles of legal evidence need illustrative cases to explain their meaning and use, as they are better learnt from specific illustrations and from actual practice than from abstract theories. The author has, therefore, studiously selected the cases best calculated to serve the purpose, and has, in all instances, set forth as much of the special facts on which the decision of the

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\* For practical hints, *vide* author's 'Sequel to the Indian Evidence Act.'

case with reference to the subject of this work turned. He has spared neither time nor pains to make the work useful to the student of law, as also to Judges and legal practitioners, and he will be perfectly well pleased if the legal public find it of any help to them."

TARAPADA BANERJI.

KRISHNAGHUR, }  
*The 21st December 1896.* }

THE  
LAW OF EVIDENCE IN INDIA  
BEING  
ACT I OF 1872.

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PASSED BY THE GOVERNOR-GENERAL OF INDIA  
IN COUNCIL.

(Received the assent of the Governor-General  
in Council on 15th March 1872).

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**WHEREAS** it is expedient to consolidate, define  
and amend the law of evidence; It  
is hereby enacted as follows :—

Preamble.

**PART I.**  
RELEVANCY OF FACTS.

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CHAPTER I.  
PRELIMINARY.

1. This Act may be called “The Indian Evidence Act, 1872.”

Short title. Extent. Commencement of Act.	It extends to the whole of British India, and applies to all judicial proceedings in or before any Court, including Courts Martial, but not to affidavits presented to any Court or officer, nor to proceedings before an arbitrator; and it shall come into force on the first day of September 1872.
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“The law of evidence is the *lex fori*, which governs the Courts. Whether a witness is competent or not: whether a certain matter

requires to be proved by writing or not : whether certain evidence proves a certain fact or not : that is to be determined by the law of the country where the question arises, where the remedy is sought to be enforced and where the Court sits to enforce it." *Vide* remarks of Lord Brougham in *Bain v. Whitehaven and Furness Railway Company*, 3 H. L. C. 1.

**Court Martial.**—The Mutiny Act provides : "No Court Martia shall in respect of the conduct of its proceedings, or the reception or rejection of evidence, be subject to the provisions of the "Indian Evidence Act, 1872, or any Act of any Legislature, other than the Parliament of United Kingdom"—38 Vic., c. 7, sec. 101.

**British India.**—British India means the territories vested in Her Majesty by the Statute 21 and 22 Vic., c. 106, entitled "An Act for the better government of India."

**The Straits Settlement.**—The Straits Settlement is no longer a part of British India—*Vide* 29 and 30 Vic., c. 115.

**Application of the Act.**—(a). It has been applied to the assigned Districts of Haidrabad and cantonment of Sikandrabad. *Vide* Foreign Department No. 80J, dated 2nd May 1872.

(b). Act XX of 1886 declares it to be in force in Upper Burmah.

(c). Its operation has been extended to the Scheduled Districts by notification in *Government Gazette of India*, 1881, Part I, p. 504.

(d). It is in force in the *Hill District of Arakan* (*vide* Reg. IX of 1874, sec. 3), in the *Santal Parganas* by Reg. III of 1872 and Reg. III of 1886.

**Affidavits.**—*Vide* secs. 194-197, Civil Procedure Code ; sec. 539, Criminal Procedure Code.

**Arbitration.**—As to proceedings before arbitrators, *vide* secs. 506-526, Civil Procedure Code (Act XIV of 1882).

An arbitrator does wrong in receiving and using as evidence a document which ought not to be received. Where he improperly admitted a letter written without prejudice, it was *held* that it was not a sufficient ground for refusing to confirm the award—*Howard v. Wilson*, 1. L. R. 4 Cal. 231. In this case their Lordships remarked : "Communications such as these are clearly inadmissible in evidence. They are excluded on grounds of public policy and convenience ; and the rule of law which excludes them is as binding upon the arbitrators as upon Courts of Justice, notwithstanding sec. 1 of the Evidence Act (see Taylor on Evidence, sec. 795, and the authorities therein cited)."



Repeal of  
enactments.

2. On and from that day the following laws shall be repealed :—

(1) All rules of evidence not contained in any Statute, Act or Regulation in force in any part of British India :

(2) All such rules, laws and regulations as have acquired the force of law under sec. 25 of 'The Indian Councils Act, 1861,' in so far as they relate to any matter herein provided for ; and

(3) The enactments mentioned in the schedule hereto, to the extent specified in the third column of the said schedule.

But nothing herein contained shall be deemed to affect any provision of any Statute, Act or Regulation in force in any part of British India and not hereby expressly repealed.

It seems that this section will preclude the Courts of our country from following the English rules of evidence in future, but cases may arise for which it will be difficult to find a positive solution in the Act itself and in such cases it is always safe to adopt English rules in so far as they follow or are in accord with the general lines of the Act. Mr. Field says : " It may be well to remember that the Evidence Act does not contain the whole of the law of evidence as enacted by the Legislature, but at the same time there are no other rules of evidence now in force in India, except such as are contained in this Act or in some other Statute, Act or Regulation in force in British India." In *Foister's case* (11 Rep. 63 : Dyer 347) it has been held that all rules and enactments which have not been expressly repealed, must be considered to be in force. Statutes are not to be considered as repealed by implication, unless the repugnancy between the new provision and a former statute be plain and unavoidable.

(a). In *Lekraj Kuar v. Mahpal Singh*, I. L. R. 5 Cal. 754, their Lordships of the Privy Council remarked that " The Indian Evidence Act has repealed all rules of evidence not contained in any Statute or Regulations and the plaintiff must therefore shew that these papers (*warab-ul-arz* or village administration papers made according to the

provisions of Reg. VII of 1822) are admissible under some provision of the Indian Evidence Act."

All decisions passed before this Act came into operation have no binding force now.

(b). Sec. 25, Indian Councils Act, 1861, 24 and 25 Vic., c. 67, refers to various rules as to evidence, issued previously by the Government in Non-Regulation Provinces.

**Statutory provisions still in force.**—Several provisions of the Statutes of the British Parliament and of Acts of the Indian Legislature relating to the subject of evidence are still in force in India. The following English Statutes and Acts and Regulations of the Indian Legislature, may be referred to :—

### I. English Statutes.

- |   |                        |
|---|------------------------|
| 13 Geo. 3, c. 63, secs. 40, 42, 44, 45.   | } Government of India. |
| 21 Geo. 3, c. 70, sec. 6.   |                        |
| 26 Geo. 3, c. 57, secs. 28, 38. Procedure in Parliament against Indian offenders. |                        |
| 3 and 4 Will. 4, c. 41, secs. 7, 13. Appeals to Judicial Committee.               |                        |
| 11 and 12 Vic., c. 21, sec. 77. Insolvent Debtors.                                |                        |
| 19 and 20 Vic., c. 113. Evidence before Foreign Tribunals.                        |                        |
| 22 Vic., c. 20. Taking Evidence out of Jurisdiction.                              |                        |
| 33 Vic., c. 14, sec. 12. Naturalization.  |                        |
| 33 and 34 Vic., c. 52, secs. 14, 15, 24. Extradition.                             |                        |
| c. 102, sec. 1. Oaths of Allegiance on Naturalization.                            |                        |
| 36 and 37 Vic., c. 60, secs. 4 and 5. Extradition.                                |                        |
| 44 and 45 Vic., c. 58, secs. 52, 126, 163-165. Army.                              |                        |

### II. Acts of the Governor-General in Council relating to Evidence.

- XX of 1847, sec. 3. Copyright.
- XIX of 1850, sec. 2. Binding Apprentices.
- XXXII of 1855, sec. 7. Ports and Port Dues.
- XXV of 1857, sec. 6. Forfeitures.
- XXI of 1860, sec. 19. Registration of Societies.
- XLV of 1860, secs. 179, 201. Penal Code.
- III of 1867, secs. 10, 11. Public Gambling.
- XXV of 1867, secs. 7, 8. Printing Presses and Books.
- IV of 1869, sec. 51. Divorce.
- V of 1869, Arts. 111-113, 122, 124, 128. Native Articles of War.
- XX of 1869, sec. 6. Volunteers.
- XXXIII of 1871, sec. 9. Land Revenue, Panjab.
- Madras Act III of 1869, sec. 5. Revenue officers' power to summon witnesses.
- Bombay Act III of 1866, sec. 9. Gambling.

The provisions of the above Statutes and Acts relate chiefly to the production and record of evidence, and may properly be considered along with the provisions contained in Part III of this Act.

Subsequent to the passing of the Evidence Act, the following Acts have been passed which relate to evidence :—

- III of 1872, sec. 14. Marriage.
- XV of 1872, sec. 80. Marriage of Christians.
- XVIII of 1872. Evidence.
- V of 1893, sec. 8. Savings Bank.
- XIX of 1873, secs. 215, 219. Land Revenue.
- V of 1875, sec. 1. Unattested Sepoys.
- XVII of 1875, secs. 20, 91. Burma Courts.
- XX of 1875, secs. 11, 12. Central Provinces Laws.
- III of 1876, secs. 33, 54, 90. Burma Labour.
- XI of 1876, sec. 18. Presidency Banks.
- XVIII of 1876, sec. 19. Oudh Laws.
- III of 1877, secs. 49, 77. Registration.
- VII of 1870, sec. 71. Forests.
- I of 1879, secs. 31, 34, 39, 50. Stamps.
- II of 1879, sec. 2. Central Provinces Evidence.
- XVII of 1879, secs. 9, 56. Dekhan Ryots Relief.
- XXI of 1879, sec. 19. Foreign Jurisdiction.
- XVIII of 1881, sec. 12. Petroleum.
- XV of 1881, sec. 16. Factories.
- VI of 1882. Companies' Act.
- VII of 1882, sec. 4. Powers of Attorney.
- X of 1882. Criminal Procedure Code.
- XIV of 1882. Civil Procedure Code.
- Bombay Act II of 1874, secs. 48, 51. Jails.
- Act II of 1876, secs. 19, 29, 40. Land Revenue, Bombay City.
- Reg. V of 1872, sec. 3. Sindh Frontiers.
- Reg. XVII of 1877, sec. 29. Ajmere Frontier.
- Bengal Act IX of 1880, sec. 95. Cess.

3. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context :—

Interpretation-  
clause.

“Court” includes all Judges and Magistrates and all persons, except arbitrators, legally authorized to take evidence.

“Court.”

"Fact."

"Fact" means and includes—

(1) any thing, state of things, or relation of things, capable of being perceived by the senses ;

(2) any mental condition of which any person is conscious.

### *Illustrations.*

(a). That there are certain objects arranged in a certain order in a certain place, is a fact.

(b). That a man heard or saw something, is a fact.

(c). That a man said certain words, is a fact.

(d). That a man holds a certain opinion, has a certain intention, acts in good faith or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.

(e). That a man has a certain reputation, is a fact.

One fact is said to be relevant to another when  
"Relevant."      the one is connected with the other  
                         in any of the ways referred to in the  
provisions of this Act relating to the relevancy of  
facts.

The expression "Facts in issue" means and  
"Facts in issue."      includes—any fact from which either  
                         by itself or in connection with other  
facts, the existence, non-existence, nature or extent  
of any right, liability or disability, asserted or denied  
in any suit or proceeding, necessarily follows.

*Explanation.*—Whenever, under the provisions of the law for the time being in force relating to Civil Procedure, any Court records an issue of fact, the fact to be asserted or denied in the answer to such issue is a fact in issue.

*Illustrations.*

A is accused of the murder of B.

At his trial the following facts may be in issue :—

That A caused B's death ;

That A intended to cause B's death ;

That A had received grave and sudden provocation from B ;

That A, at the time of doing the act which caused B's death, was, by reason of unsoundness of mind, incapable of knowing its nature.

“Document” means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

*Illustrations.*

A writing is a document :

Words printed, lithographed or photographed are documents :

A map, or plan is a document :

An inscription on a metal plate or stone is a document :

A caricature is a document.

“Evidence.” “Evidence” means and includes—

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry ;

such statements are called oral evidence ;

(2) all documents produced for the inspection of the Court ;

such documents are called documentary evidence.

A fact is said to be proved when, after considering the matters before it, the Court

“Proved.” either believes it to exist, or considers

its existence so probable that a prudent man ought,

under the circumstances of the particular case, to act upon the supposition that it exists.

A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

A fact is said not to be proved when it is neither "Not proved." proved nor disproved.

When a definition is intended to be exclusive, it would seem the form of words is 'means and includes'—*Empress v. Ashutosh Chuckerbutty*, I. L. R. 4 Cal. 483.

**Court.**—The definition seems to include Commissions to take evidence under the Civil and Criminal Procedure Codes.

In a jury trial the word 'Court' must mean 'the Judge and the jury'—*Empress v. Ashutosh Chuckerbutty*, I. L. R. 4 Cal. 483.

**Sub-Registrar.**—(a). In the case of *Sardharilol*, 22 W. R. Cr. 10, it was held that a Sub-Registrar is a Court within the meaning of this section.

(b). In *re Venkatachala Pillai*, I. L. R. 10 Mad. 154, it was held that a Sub-Registrar acting under sec. 41 of the Indian Registration Act, 1877, is a Court within the meaning of sec. 195 of the Criminal Procedure Code. The same High Court in the case of *Queen-Empress v. Subba*, I. L. R. 11 Mad. 3, held, that a Sub-Registrar acting under sec. 34 of the Registration Act is not a Court within the meaning of sec. 195 of the Criminal Procedure Code. In the case of *Atchyya v. Gangayya*, I. L. R. 15 Mad. 138, it was held by a Full Bench that a Registrar while acting under secs. 72—75 of the Registration Act is a Court for the purposes of sec. 195, Criminal Procedure Code.

(c). The Bombay High Court in the case of *Queen-Empress v. Tulja*, I. L. R. 12 Bom. 36, held, that a Sub-Registrar is not a Court within the meaning of sec. 195 of the Criminal Procedure Code.

(d). In the case of *Krishna Nath Kundu v. Brown*, I. L. R. 14 Cal. 176, it was held, that a Registering Officer was a Court within the meaning of this section. This case has, however, been dissented from in *Salimatul Fatima v. Koylashpati Narain Singh*, I. L. R. 17 Cal. 903.

**Fact.**—It is important to remember with respect to facts that as all thought and language contains a certain element of generality, it is always possible to describe the same facts with greater or less minuteness, and to decompose every fact with which we are concerned into a number of subordinate facts. Thus we might speak of the presence of several persons in a room at one time as a fact, but if the fact were doubted, or if other circumstances rendered it desirable, their respective positions, their occupations, the positions of the furniture and many other particulars might have to be specified.—Stephen's Evidence Act, 16.

Statements, feelings, opinions, and states of mind are just as much facts as any other circumstances of which, through the medium of the senses or by our self-consciousness, we have become aware; and they are admissible in evidence, if they comply with the requirements of the relevancy sections.

Mr. Best gives three divisions of facts. He says:—"In the first place, facts are either *physical* or *psychological*. By 'physical facts' are meant such as either have their seat in some inanimate being or if in one that is animate, then not by virtue of the qualities which constitute it such; while 'psychological facts' are those which have their seat in an animate being, by virtue of the qualities by which it is constituted animate. Thus, the existence of visible objects, the outward acts of intelligent agents, the *res geste* of a law-suit, &c., range themselves under the former class; while to the latter belong such as only exist in the mind of an individual; as, for instance, the sensations or recollections of which he is conscious, his intellectual assent to any proposition, the desires or passions by which he is agitated, his animus or intention in doing particular acts, &c. II. Facts 'are either *events* or *states of things*.' By an 'event' is meant some motion or change, considered as having come about either in the course of nature, or through the agency of human will; in which latter case it is called an act or an action. The remaining division of facts is into *positive* or *affirmative*, and *negative*: a distinction which, unlike both the former, does not belong to the nature of the facts themselves, but to that of the discourse which we employ in speaking of them. The existence of a certain state of things is a positive or affirmative fact, the non-existence of it is a negative fact."—*Vide secs. 12-13.*

Sir James Stephen divides facts into *external* and *internal*, and makes the following observations:—He says, "during the whole of our walking life, we are in a state of perception; whatever may be the objects of our perceptions, they make up collectively the whole sum of our

thoughts and feelings. They constitute, in short, the world with which we are acquainted, for without entering upon the question of the existence of the external world, it may be asserted with confidence that our knowledge of it is composed : *first*—of our perceptions ; and *secondly*—of the inferences which we draw from them as to what we should perceive if we were favourably situated for that purpose. There is another class of perceptions, transient in their duration, and not perceived by the five best marked senses, which are, nevertheless, distinctly perceptible and of the utmost importance. These are thoughts and feelings : love, hatred, anger, intention, will, wish, knowledge, opinion, are all perceived by the person who feels them. The only difference between the two classes of propositions is this. When it is affirmed that a man has a given intention, the matter affirmed is one which he and he only can perceive ; when it is affirmed that a man is sitting or standing, the matter affirmed is one which may be perceived not only by the man himself, but by any other person able to see, and favourably situated for the purpose."

The decision, which the judgment contains is no more a fact than an opinion expressed by any other person who is not exercising judicial functions—*Gujju Lal v. Futeh Lal*, 6 C. L. R. 457.

**Relevant.**—Facts, which are not themselves in issue, may affect the probability of the existence of facts in issue and be used as the foundation of inferences respecting them ; such facts are described in the Act as relevant facts. Secs. 5—55 of the Code treat of the relevancy of facts.

**Facts in issue.**—Facts, out of which some legal right, liability or disability, involved in the enquiry, necessarily arises, and upon which, accordingly, a decision must be arrived at, are *facts in issue*. Matters which are affirmed by the one party to a suit, and denied by the other, may be denominated *facts in issue* ; what facts are in issue in particular cases, is a question to be determined by the substantive law, or in some instances, by that branch of the law of procedure, which regulates the forms of pleading, civil or criminal. In this connection refer to secs. 146—151 of the Civil Procedure Code.

**Document.**—*Vide* sec. 29 of the Indian Penal Code. This definition is the same as is given in the said section, with the exception of the last seven words.

**Evidence.**—This definition does not include "all material things, other than documents produced for the inspection of the Court—such as weapons or articles of stolen property." The Bill, as originally drafted, called such things as 'material evidence' and



made them the matter of a third sub-division of the definition, but the Select Committee omitted this sub-division without any reason whatever. Sec. 60 gives the Court power to require for its inspection, the production of any material thing regarding which oral evidence is given. Sec. 58 of the Common Law Procedure Act, 1854, provides for the inspection by the Court or a Judge of any real or personal property, the inspection of which may be material to the proper determination of the question in dispute. Sec. 592 of the Civil Procedure Code provides for a local investigation by the Judge in person. Sec. 293 of the Code of Criminal Procedure makes a provision for a view by the jury or assessors of the place in which any offence charged is said to have been committed, or any other place in which any other transaction material to the enquiry in the trial took place.

The word "Evidence," says Mr. Taylor "considered in relation to law, includes all the legal means, exclusive of mere argument, which tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation. This term and the word *proof* are often used as synonymous ; but the latter is applied by accurate logicians, rather to the *effect* of evidence, than to evidence itself."

Mr. Best says :—"The word evidence signifies in its original sense the state of being evident, i.e., plain, apparent or notorious. But by an almost peculiar inflexion of our language, it is applied to that which tends to render evident or to generate proof. This is the sense in which it is commonly used in our law books. Evidence thus understood, has been well defined—any matter of fact, the effect, tendency or design of which is to produce in the mind a persuasion, affirmative or disaffirmative of the existence of some other matter of fact. The fact sought to be proved is termed 'the principal fact ; the fact which tends to establish it,' the evidentiary fact."

**Proved.**—Absolute certainty, amounting to demonstration, is seldom to be had in the affairs of life, and we are frequently obliged to act on degrees of probability which fall very far short of it indeed. Practical good sense and prudence consist mainly in judging aright whether in each particular case, the degree of probability is so high as to justify one in regarding it as certainty and acting accordingly. A merchant receives intelligence that some firm is solvent, or that the rate of exchange will vary, or that some change in the tariff will be introduced. A General gets some information about the movements or resources of the enemy. The success of either will depend on his judging soundly and well when he ought to act on the assumption that what he hears is true, or when prudence bids him assume it to

be false. If he waited for absolute certainty, he would never act at all. In like manner all that a Judge need look for is such a high degree of probability that a prudent man in any other transaction where the consequences of mistake were equally important, would act on the assumption that the thing was true. The section is so worded as to provide for two conditions of mind; *first*, that in which a man feels absolutely certain of a fact, in other words "believes it to exist"; and *secondly*, that in which though he may not feel absolutely certain of a fact, he thinks it so extremely probable that a prudent man would, under the circumstances, act on the assumption of its existence.

A distinction has sometimes been drawn between the probative effects of evidence in civil and in criminal cases, and the doctrine has been laid down that a fact may be regarded as proved for civil purposes, though the evidence would not sustain it for the purpose of a criminal conviction. "There is," says Mr. Best (sec. 95), "a strong and marked difference as to the *effect* of evidence in civil and criminal proceedings. In the former, a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis of decision; but in the latter, especially when the offence charged amounts to treason or felony, a much higher degree of assurance is required. The serious consequences of an erroneous condemnation both to the accused and society, the immeasurably greater evils which flow from it than from an erroneous acquittal, have induced the laws of every wise and civilized nation to lay down the principle, though often lost sight of in practice, that the persuasion of guilt ought to amount to moral certainty, or, as an eminent Judge expressed it, 'Such a moral certainty as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt.'

4. Whenever it is provided by this Act that  
 "May pre. the Court may presume a fact, it may  
 sume." either regard such fact as proved,  
 unless and until it is disproved or may call for proof  
 of it :

Whenever it is directed by this Act that the  
 "Shall pre. Court shall presume a fact, it shall  
 sume." regard such fact as proved, unless and  
 until it is disproved :

When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

A presumption of any fact is properly an inference of that fact from other facts that are known ; it is an act of reasoning.

In treatises on the law of evidence presumptions are generally classed under two heads : *first*, *Disputable* or *Rebuttable* presumptions ; *secondly*, *Absolute* or *Irrebuttable* presumptions. The cases where the Court may presume are instances of *rebuttable* presumptions. When one fact is declared to be 'conclusive proof' of another, it is an instance of *irrebuttable* presumption.

This section does away with all distinctions between presumptions of fact and presumptions of law, and all presumptions are made to fall under one or other of the three classes mentioned in it.

**May presume.**—The Court may presume certain facts under secs. 86, 87, 88, 90, 114, and 148 (4). Secs. 86, 87, 88, and 90 mention several instances of presumptions as to documents, and the Courts may throw the burden of proof on which party it pleases. Sec. 114 includes by far the largest class of presumptions which the "common course of natural events, human conduct, and private and public business" suggest to us. The Courts may presume adversely to the witness who refuses to answer questions put to him, under sec. 148 (4). The Courts may draw the inferences which the facts suggest, at once, and call on the opposite party to disprove it, or may refuse to draw any inference and call for proof of it, independent of the facts by which the inference was suggested.

**Shall presume.**—The Court shall presume certain facts under secs. 79, 80, 81, 82, 83, 84, 85, 89, and 105. These sections give no option to the Court, but compel it to take the facts mentioned in them as proved until evidence is given to disprove them.

**Conclusive proof.**—For instances of "conclusive proof," see secs. 41, 112, and 113. "An artificial probative effect is given by the law to certain facts, and no evidence is allowed to be produced with a view of combating that effect. These cases generally occur where it is against the policy of government or the interests of society that a matter should be further open to dispute.

Sir James Stephen in his "Introduction to the Evidence Act" says :—"Presumptions are of four kinds according to English law :

"1. Conclusive presumptions. These are rare, but when they occur they provide that certain modes of proof shall not be liable to contradiction.

"2. Presumptions which affect the ordinary rule as to the burden of proof that he who affirms must prove. He who affirms that a man is dead must usually prove it, but if he shows that the man has not been heard of for seven years, he shifts the burden of proof on his adversary.

"3. There are certain presumptions which, though liable to be rebutted, are regarded by English law as being something more than mere maxims, though it is by no means easy to say how much more. An instance of such a presumption is to be found in the rule that recent possession of stolen goods unexplained, raises a presumption that the possessor is either the thief or a receiver.

"4. Bare presumptions of fact, which are nothing but arguments to which the Court attaches whatever value it pleases."

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## CHAPTER II.

### OF THE RELEVANCY OF FACTS.

"Facts may be related to rights and liabilities in one of two ways :—

(1). They may by themselves, or in connection with other facts, constitute such a state of things that the existence of the disputed right or liability would be a legal inference from them. From the fact that A is the eldest son of B, there arises of necessity the inference that A is by the law of England the heir-at-law of B, and that he has such rights as that *status* involves. From the fact that A caused the death of B under certain circumstances, and with a certain intention or knowledge, there arises of necessity the inference that A murdered B, and is liable to the punishment provided by law for murder.

Facts thus related to a proceeding may be called facts in issue, unless their existence is undisputed.

(2). Facts, which are not themselves in issue in the sense above explained, may affect the probability of the existence of facts in issue, and be used as the foundation of inferences respecting them ; such facts are described in the Evidence Act as relevant facts.

All the facts with which it can in any event be necessary for Courts of Justice to concern themselves, are included in these two classes."—Stephen's Evidence Act, 9-10.

The present chapter sets out the ways in which facts must be connected with each other in order to be relevant.

The provisions as to proof contained in Part II, the rules as to estoppel in Chapter VIII, and the rules contained in secs. 121—127, restrict and exclude the evidence of relevant facts, under circumstances therein mentioned.

The law upon the subject of the relevancy of facts in judicial evidence in India is contained in secs. 6—16. The rules herein propounded are not deduced from first principles, but are generalizations from actual experience, and, consequently, it is possible that in some unusual cases the language of the rules may not prescribe with accuracy the true limit of relevancy, and we may expect to find in them things that may not be strictly confined to the subject of relevancy.

5. Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

Evidence may be given of facts in issue and relevant facts.

*Explanation.*—This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure.

### *Illustrations.*

(a). A is tried for the murder of B by beating him with a club with the intention of causing his death. At A's trial the following facts are in issue :—

A's beating B with club ; A's causing B's death by such beating ; A's intention to cause B's death.

(b). A suitor does not bring with him, and have in readiness for production at the first hearing of the case, a bond on which he relies. This section does not enable him to produce the bond or prove its contents at a subsequent stage of the proceedings, otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure.

This section renders exclusive everything which is not covered by the purview of some other section which follows in the statute. The safest guide in regard to the admissibility of evidence is that all evidence should be excluded which the Act does not expressly authorize.

All preliminary facts which are necessary to establish the admissibility of evidence must be proved *aliunde* before such evidence may be received.

A statement of a witness for the defence, that a witness for the prosecution was at a particular place at a particular time, and consequently could not then have been at another place, where the latter states he was, and saw the accused persons, is properly admissible in evidence, even though the witness for the prosecution may not himself have been cross-examined on the point. Such evidence is receivable under this section and secs. 11 and 153, ill. (c) of the Act—*Reg v. Sakharu Mukundje*, 11 Bom. H. C. R., 166.

The provisions of the Code of Civil Procedure are not affected by this section. See Civil Procedure Code, secs. 59, 60, 62, 63, 138, and 139, as to original hearings, and sec. 568, as to appeals.

6. Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

Relevancy of facts forming part of same transaction.

### *Illustrations.*

(a). A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

(b). A is accused of waging war against the Queen by taking part in an armed insurrection in which property is destroyed, troops are attacked, and gaols are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, though A may not have been present at all of them.

(c). A sues B for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to

the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.

(d). The question is, whether certain goods ordered from B were delivered to A. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact.

This section and the remaining sections of the chapter give illustrations of relevant facts.

Relevancy has been very fully defined in secs. 6—11 both inclusive. "These sections enumerate specifically the different instances of the connection between cause and effect which occur most frequently in judicial proceedings, they are designedly worded very widely, and in such a way as to overlap each other. Thus a motive for a fact in issue (sec. 8) is part of its cause (sec. 7). Subsequent conduct influenced by it (sec. 8) is part of its effect (sec. 7). Facts relevant under sec. 11 would, in most cases, be relevant under other sections. The object of drawing the Act in this manner was that the general ground on which facts are relevant might be stated in as many and as popular forms as possible, so that if a fact is relevant, its relevancy may be easily ascertained.

"These sections are by far the most important, as they are the most original part of the Evidence Act, as they affirm positively what facts may be proved, whereas the English law assumes this to be known, and merely declares negatively that certain facts shall not be proved."—Stephen's Evidence Act, 55.

The following remarks of Mr. Best on the subject of admissibility are worthy of notice. "As a condition precedent to the *admissibility* of evidence, either direct or circumstantial, the law requires an *open and visible connection* between the principal and evidentiary facts, whether they be ultimate or subalternate. This does not mean a *necessary* connection—that would exclude all *presumptive* evidence,—but such as is reasonable, and not latent or conjectural..... But whether a given fact, bearing indirectly on a matter in issue, should be received as circumstantial, or rejected as conjectural is often a question of extreme difficulty. One test, perhaps, is to consider whether any imaginable number of pieces of evidence, such as that tendered, could be made the ground of decision, for it is the property of a chain of genuine circumstantial evidence, that, however inconclusive each link is in itself, the concurrence of all the links may amount to proof, often of the most convincing kind. Suppose, in a case of murder by a cutting instrument, no eye witness being

forthcoming, the criminative facts against the accused were : 1. He had had a quarrel with the deceased a short time previous. 2. He had been heard to declare that he would be revenged on the deceased. 3. A few days before the murder the accused bought a sword or large knife, which was found near the corpse. 4. Shortly after the murder he was seen at a short distance from the spot and coming away from it. 5. Marks corresponding with the impressions made by his shoes were traceable near the body. 6. Blood was found on his person soon after the murder. 7. He absented himself from his home immediately after it. 8. He gave inconsistent accounts of where he was on the day it took place. The weakness of any one of these elements, *taken singly*, is obvious, but collectively they form a very strong case against the accused. Now suppose, instead of the above chain of facts, the following evidence was offered : 1. The accused was a man of bad character. 2. He belonged to a people notoriously reckless of human life, and addicted to assassination. 3. On a former occasion he narrowly escaped being convicted of the murder of another person. 4. Much jealousy and ill-feeling existed between his nation and that to which the deceased belonged. 5. On the same spot a year before, one of the latter was murdered by one of the former in exactly the same way. 6. The murderer had also robbed the deceased, and the accused was well known to be avaricious. 7. He had been overheard, in his sleep, to use language implying that he was the murderer. 8. All his neighbours believed him guilty ; or, supposing the case one of public interest, both Houses of Parliament had voted addresses to the crown in which he was assumed to be the guilty party. These and similar matters, however multiplied, could never generate that rational conviction on which alone it is safe to act ; and accordingly not one of them would be received as legal evidence.”—Best, 73, 74.

Facts forming part of the same transaction are facts which are described by text writers as being part of the *res gestæ*. Whether any particular fact is or is not part of the same transaction is a question of law upon which no principle has been stated by authority and on which Judges have given different opinions. The Judge is therefore left to decide whether the facts to be proved and the facts in issue are so closely and immediately connected with each other as practically to constitute a single group.

Contemporaneous statements are relevant under this section or secs. 8, 9 or 14, as they are facts forming part of the transaction to which they relate.

Sometimes acts may form part of the same transaction, though they occur at distant places or different times, the reason being that



"if several and distinct offences do so intermix and blend themselves with each other, the detail of the party's whole conduct must be pursued"—*R. v. Whorley*, 2 Leach, 985.

A statement by a man, who has been run over by another, made immediately after the accident, has been admitted in England as part of the *res gestæ*—*R. v. Foster*, 1 C. and P. 325.

In the case of *Surat Dhopani*, I. L. R. 10 Cal. 302, the prisoner was charged with having voluntarily caused grievous hurt to her daughter-in-law. The only evidence against the prisoner was a statement made in her presence by her daughter-in-law to a neighbour immediately after the commission of the offence. It also appeared that the prisoner did not deny that she had inflicted the injuries. Mitter and Field, JJ., held that the statement was admissible under this section as also under sec. 8 (ill. j).

A letter written by a party to a conspiracy and relating to it was held to be admissible to show the nature and object of the conspiracy against a person charged with being connected with it.—(*Hardy's Case*, 24 S. T. 473).

7. Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

Facts which are occasion, cause or effect of facts in issue.

### *Illustrations.*

(a). The question is, whether A robbed B. The facts that, shortly before the robbery, B went to a fair with money in his possession, and that he showed it, or mentioned the fact that he had it, to third persons, are relevant.

(b). The question is, whether A murdered B. Marks on the ground, produced by a struggle at or near the place where the murder was committed, are relevant facts.

(c). The question is, whether A poisoned B. The state of B's health before the symptoms ascribed to poison, and habits of B, known to A, which afforded an opportunity for the administration of poison, are relevant facts.

*Vide notes to sec. 6.*

"The rule that facts may be regarded as relevant which can be shown to stand either in the relation of cause or in the relation of effect to the fact to which they are said to be relevant, may be accepted as true, subject to the caution that, when an inference is to be founded upon the existence of such a connection, every step by which the connection is made out must either be proved or be so probable under the circumstances of the case that it may be presumed without proof."—Stephen's Evidence Act, 54.

Facts may not properly form part of a transaction within the meaning of sec. 6, yet they may be connected with each other in particular modes, and become relevant when the transaction itself is the subject-matter of inquiry. The facts mentioned in this section, are facts which are calculated to produce, or afford opportunity for producing the thing, the occurrence or otherwise of which is under inquiry. Illustration (a) is an instance of facts relevant as giving occasion or opportunity; illustration (b) of facts constituting an effect; illustration (c) of facts constituting the state of things under which an alleged fact happened.

8. Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

Motive, preparation and previous or subsequent conduct.

The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

*Explanation 1.*—The word "conduct" in this section does not include statements, unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.

**Explanation 2.**—When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant.

*Illustrations.*

(a). A is tried for the murder of B. The facts that A murdered C, that B knew that A had murdered C, and that B had tried to extort money from A by threatening to make his knowledge public, are relevant.

(b). A sues B upon a bond for the payment of money. B denies the making of the bond. The fact that, at the time when the bond was alleged to be made, B required money for a particular purpose, is relevant.

(c). A is tried for the murder of B by poison. The fact that before the death of B, A procured poison similar to that which was administered to B, is relevant.

(d). The question is, whether a certain document is the will of A. The facts that, not long before the date of the alleged will, A made inquiry into matters to which the provisions of the alleged will relate; that he consulted vakils in reference to making the will, and that he caused drafts of other wills to be prepared, of which he did not approve, are relevant.

(e). A is accused of a crime. The facts that, either before, or at the time of, or after the alleged crime, A provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence, respecting it, are relevant.

(f). The question is, whether A robbed B. The facts that, after B was robbed, C said in A's presence—'the police are coming to look for the man who robbed B,' and that immediately afterwards A ran away, are relevant.

(g). The question is, whether A owes B 10,000 rupees. The facts that A asked C to lend him money, and that D said to C in A's presence and hearing—'I advise you not to trust A, for he

owes B 10,000 rupees,' and that A went away without making any answer, are relevant facts.

(*h*). The question is, whether A committed a crime. The fact that A absconded after receiving a letter warning him that inquiry was being made for the criminal, and the contents of the letter, are relevant.

(*i*). A is accused of a crime. The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant.

(*j*). The question is, whether A was ravished. The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which, the complaint was made, are relevant. The fact that, without making a complaint, she said that she had been ravished is not relevant as conduct under this section, though it may be relevant as a dying declaration under section thirty-two, clause (1), or as corroborative evidence under section one hundred and fifty-seven.

(*k*). The question is, whether A was robbed. The fact that, soon after the alleged robbery, he made a complaint relating to the offence, the circumstances under which, and the terms in which, the complaint was made, are relevant. The fact that he said he had been robbed, without making any complaint, is not relevant as conduct under this section, though it may be relevant as a dying declaration under section thirty-two, clause (1), or as corroborative evidence under section one hundred and fifty-seven.

Illustrations (*a*) and (*b*) are instances showing *motives*; (*c*) and (*d*), *preparation*; (*e*) and (*i*), *conduct* of a party to the proceeding; (*f*), (*g*) and (*h*), of *statements* made to or in the hearing of a person, whose conduct is relevant; (*j*) and (*k*), of statements accompanying and explaining the conduct of a person against whom an offence has been imputed.

**Statements.**—This section admits statements only so far as they accompany and explain acts. Sec. 10 refers to statements made by conspirators; sec. 14, illa. (*k*), (*l*) and (*m*) refer to statements showing

states of mind and body ; secs. 17—31 refer to admissions and confessions ; secs. 32—38 refer to statements made by deceased persons, persons who can not be called as witnesses and to statements made under special circumstances ; secs. 155 and 157 refer to former statements of witnesses. The sections mentioned above, detail the circumstances under which particular statements, notwithstanding their inherent infirmity, may be admitted in evidence, under peculiar circumstances.

**Explanation 1.**—This explanation does not render admissible as evidence, any statement which secs. 25 and 26 exclude, and is not to be construed as if it were a proviso to those sections—*Queen-Empress v. Nasa*, I. L. R. 14 Bom. 260.

**Explanation 2.**—The provisions contained in explanation 2, make relevant statements made to or in the presence of a party whose conduct is in question, and which can be shown in any way to affect such conduct. They are important in explaining a man's motive, intention, &c. The illustrations given in (f), (g) and (h) are instances of such statements. In order to make such statements relevant evidence against the party whose conduct is in question, it should be shown (1) that all what was said, written or done to him by others is shown to have come to his *actual knowledge*, (2) that by such statement his conduct is likely to have been affected, (3) that he had an opportunity of replying to or contradicting the allegations made against him.

**Statement made to him.**—The words 'statement made to him' would seem to include letters addressed to a person and shown to have come to his knowledge, and an adverse inference may be drawn from the fact of his not answering it. But the English law is different. Mr. Taylor in sec. 735 says, "What is said to a man before his face, observed Lord Tenterden in *Fairlie v. Denton*, he is in some degree called upon to contradict, if he does not acquiesce in it ; but the not answering a letter is quite different ; and it is too much to say, that a man, by omitting to answer a letter at all events, admits the truth of the statements that letter contains."

**What statements are admissible.**—(a). If it be shown that any act done by an accused has been so explained by his statements as to receive from those statements a character otherwise it might not have, and a character of importance for the case in hand, such statements may be admissible as what is commonly called part of the *res gesta* under this section. But the Evidence Act makes those statements admissible and those only, which are the essential complement of acts done or refused to be done, so that the act itself or the omission to act, acquires a special significance as a ground for interference with respect

to the issues in the case under trial. It is important that this should be borne in mind, as otherwise prisoners will, by the exercise of the commonest ingenuity, be entirely deprived of the safe-guard which the Legislature intended to throw round them in secs. 24 to 26 of the Act—*Empress v. Bama Birapa*, 3 Bom. 17.

(b). By illustrations (j) and (k) the *terms* of the complaint are admissible as original evidence. The English law does not allow evidence by witnesses of the *particulars* of the complaint either as original or as confirmatory evidence, and the details of the statements can only be elicited by the prisoner's counsel on cross-examination. *Vide* Taylor, sec. 519.

(c). The absence of the accused at the time when a complaint is made against him, does not affect the relevancy of such complaint and therefore does not exclude it—*Reg. v. Macdonald*, 10 B. L. R. App. 2.

**Motive and Preparation.**—"In the consideration of the cause or occasion of a fact, the state of things under which it happened, nothing can be more material than to know whether any person had an interest in its happening, or took any measures calculated to bring it about. Thus *motive* and *preparation* become of the utmost importance. If A is found murdered, the fact that B had a strong motive for wishing A dead, is, so far as it goes, a piece of evidence against B. So if A is poisoned with arsenic, the fact that B, shortly before, procured arsenic, or made arrangements by which he would have access to A's food, points to B being the poisoner, and would be a relevant fact at his trial."—Cun., 97-98.

The existence of motive is an important element in a chain of presumptive proof; as where a person, accused of having set fire to his house, has previously insured it to an amount exceeding its value; or where a man, accused of the murder of his wife, has previously formed an adulterous connection with another woman, &c. On the other hand, the absence of any *apparent* motive is always a fact in favour of the accused; although the existence of motives, invisible to all except the person who is influenced by them, must not be overlooked.—Best, 8th Ed., 402.

**Conduct.**—(a). The conduct made relevant by this section, is conduct which is *directly* and *immediately* influenced by a fact in issue or relevant fact, and it does not include actions resulting from some intermediate cause, such as questions or suggestions. *Vide* remarks of Petheram, C. J., in *Queen-Empress v. Abdullah*, 7 All. 385 (F. B.)

(b). A prisoner was indicted for theft and dishonestly receiving stolen property. The prosecutor, while travelling by train to

Calcutta, discovered the loss of the property and stated his loss to a Railway Police Inspector at the first station at which the train stopped after he became aware of the theft, the prisoner not then being present. The statement was tendered in evidence and admitted under this section, cl. (k)—*Queen v. Macdonald*, 10 B. L. R. App. 2.

(c). A and B two undivided Hindu brothers, conveyed to their mother C, one-third share in the ancestral property of the family, by a deed of sale dated 29th August 1851. Subsequently A sold one-third share in the joint ancestral property to B by a deed dated the 14th August 1852. In a suit brought by a judgment-creditor of A in 1868, to recover A's half share in the joint-property from B and C, the plaintiff gave in evidence proceedings taken by A jointly with B in 1856, against a third person relating to the same property, with a view to show that the two documents were illusory and executed to screen A's share from execution by his creditors. *Held*, that such proceedings were important and relevant evidence in order to test the *bona fides* with which A executed the two documents, as it was important to ascertain how A subsequently demeaned himself with regard to the property, his share or interest in which he purported to convey by those documents—*Girdhar Nagjeshet v. Ganpat Maroba*, 11 B. H. C. Rep. 129.

(d). On the trial of an indictment charging an assault with intent to commit rape, if the prosecutrix in cross-examination denies having voluntarily had connection with the prisoner prior to the assault, evidence to contradict her by proving such prior connection is admissible on his behalf—*R. v. Riley*, 16 Cox's C. C. 191.

(e). The silence of a party, even when the declarations are addressed to himself, at a time when he is at full liberty to reply as he thinks fit, is, at the best, worth very little as evidence of acquiescence.

(f). An attempt to suborn false witnesses is cogent evidence in the nature of admission by conduct that the cause of the party suborning false evidence, the more especially if a plaintiff, is an unrighteous one—*Mariarty v. L. C. and D. Railway* (L. R. 5 Q. B. 314).

(g). Conduct need not be contemporaneous, in order to be relevant. Concurrence of time is an important circumstance in estimating the weight to be given to the evidence when admitted.

(h). This section so far as it admits a statement as included in the word 'conduct' must be read in connection with secs. 25 and 26, and can not admit a statement, as part of the evidence which would be shut out by the said sections—*Queen-Empress v. Nana*, I. L. R. 14 Bom. 260.

(i). In construing a deed of sale, where the terms are ambiguous, the conduct of the parties immediately after, and acting upon the deed is very important ; such conduct being sometimes the only means by which the Court can know how the price of land was fixed—*Chetan Lal v. Chaterdhari Lal*, 19 W. R. 432. See also *Watson & Co. v. Mohas Nartan Rai*, 24 W. R. 176 (P. C.)

9. Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.

Facts necessary  
to explain or in-  
troduce relevant  
facts.

### *Illustrations.*

(a). The question is, whether a given document is the will of A. The state of A's property and of his family at the date of the alleged will, may be relevant facts.

(b). A sues B for a libel imputing disgraceful conduct to A ; B affirms that the matter alleged to be libellous is true. The position and relations of the parties at the time when the libel was published may be relevant facts as introductory to the facts in issue. The particulars of a dispute between A and B about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between A and B.

(c). A is accused of a crime. The fact that, soon after the commission of the crime, A absconded from his house, is relevant, under section eight, as conduct subsequent to and affected by facts in issue. The fact that, at the time when he left home, he had sudden and urgent business at the place to which he went, is relevant, as tending to explain the fact that he left home suddenly. The details of the business on which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent.



(d). A sues B for inducing C to break a contract of service made by him with A. C, on leaving A's service, says to A—'I am leaving you because B has made me a better offer.' This statement is a relevant fact as explanatory of C's conduct, which is relevant as a fact in issue.

(e). A, accused of theft, is seen to give the stolen property to B, who is seen to give it to A's wife. B says, as he delivers it—'A says you are to hide this.' B's statement is relevant as explanatory of a fact which is part of the transaction.

(f). A is tried for a riot and is proved to have marched at the head of a mob. The cries of the mob are relevant as explanatory of the nature of the transaction.

This section generally provides for facts *explanatory* of facts relevant or in issue. Such facts are relevant either—

(1) as explaining or introducing a fact relevant or in issue of which illustrations are to be found in (a), (b), (d), (e) and (f), or

(2) as supporting or rebutting an inference suggested by any such fact, as in ill. (e), or

(3) to establish the identity of any person, or to fix the time or place at which any thing happened, when these points are relevant or in issue, or

(4) to show the relation of the parties.

But the section prescribes no test of the necessity.

Circumstances often so occur as to raise a strong suspicion against a man, and any fact which tends to dispel that suspicion is relevant under this section.

Declarations made or letters written during absence from home, explanatory of the motive of departure, are admissible as original evidence, since the departure and absence are very properly regarded as one continuing act.—Taylor on Evidence, sec. 526.

In the case of *Rameshur Persaud Narain Singh v. Kunja Behari Patack*, I. L. R. 4 Cal. 633, the Judicial Committee of the Privy Council admitted in evidence the proceedings in a case in the Criminal Court of Zila Berar in which the owners of Chahal had prosecuted some ryots of Mahoot in consequence of their having closed a *Khanwa* from Mahoot to Chahal, which led to a *rasinamah* being come to between the taluqdars of the two mouzahs. One of the questions in the appeal was as to the character of the reservoir and water-courses then in dispute, and the circumstances under which

they had been presumably created and actually enjoyed. As to the *razinamah*, the Judicial Committee said :—"It was objected that this *razinamah* does not bind the proprietor of Mahoot, but although it was apparently made between tenants, it seems to have been subsequently acted on, and may be properly used to explain the character of the enjoyment of the water." Apparently those proceedings and the *razinamah* in which they resulted, would be admissible under this section as evidence of facts necessary to explain or introduce a fact in issue. The records of the proceedings in the Criminal Court in 1884 which the Judicial Committee admitted in evidence, might be admissible under this section or under sec. 13 (b).

10. Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, any thing said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

Things said or done by conspirator in reference to common design.

### *Illustration.*

Reasonable ground exists for believing that A has joined in a conspiracy to wage war against the Queen. The facts that B procured arms in Europe for the purpose of the conspiracy, C collected money in Calcutta for a like object, D persuaded persons to join the conspiracy in Bombay, E published writings advocating the object in view at Agra, and F transmitted from Delhi to G at Cabul the money which C had collected at Calcutta, and the contents of a letter written by H giving an account of the conspiracy, are each relevant, both to prove the existence of the conspiracy, and to prove A's complicity in it, although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him, and

although they may have taken place before he joined the conspiracy or after he left it.

The provisions herein contained are wider than the English law. "In connection with the above section the following points should be clearly understood : 1st—The section applies to the case either of an *offence* or of an *actionable wrong*, to joint conspirators and to co-trespassers or other *tort-feasors* ; 2nd—Before the evidence is admitted there must be *reasonable ground* to believe in the existence of a conspiracy ; 3rd—The connection of the individual in the unlawful enterprise being shown, every act and declaration of each member of the confederacy is original evidence against every other member, though ignorant of them, and though the persons doing those acts or making those declarations may have been strangers to him ; 4th—These acts and declarations are admissible as evidence though made *before* or *after* the connection with the enterprise of the individual against whom they are used ; 5th—A letter giving an account of the conspiracy is admissible, apparently even though not *written in support of it or in furtherance of it*. This last rule is contrary to that followed in England."—Field's Evidence, 5th Ed., 96.

In cases of general conspiracy where agents are employed, the acts of the agents are admissible in evidence against a party to the conspiracy in order to show the nature and the objects of the conspiracy. (Horne Tooke, 25 S. T. 127).

The fact that one of several parties to a conspiracy gave a letter to be printed, is evidence against the others to prove a circumstance in the conspiracy. (Hardy's Case, 24 S. T. 463).

Letters sent by one prisoner in pursuance of a common design is evidence against all engaged in the same conspiracy. (Stone's Case, 25 S. T. 1268).

According to this section, a letter giving an account of a conspiracy, even though not written in support of it or in furtherance of it, is admissible to prove the existence of the conspiracy or to show that any person was a party to it. In England such evidence is not allowed.

In order to bring the section into operation there must be, in the first place, *reasonable ground* to believe in the existence of the conspiracy. The principle enunciated in this section is substantially the same as that of principal and accessory, or principal and agent. When various persons conspire to commit an offence each makes the rest his agents to carry the plan into execution. In the case of *Queen v. Ameer Khan and others*, 17 W. R. Crim. 15, Couch, C. J., remarked :

"Now the rule of law is, that where several persons are proved to have combined together for the same illegal purpose, any act done by one of the parties in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of the law, the act of the whole. Each party is an agent of the others in carrying out the objects of the conspiracy and doing anything in furtherance of the common design."

11. Facts not otherwise relevant are relevant—

When facts not otherwise relevant become relevant.

(1) if they are inconsistent with any fact in issue or relevant fact; (2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

### *Illustrations.*

(a). The question is, whether A committed a crime at Calcutta on a certain day. The fact that, on that day, A was at Lahore, is relevant. The fact that, near the time when the crime was committed, A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.

(b). The question is, whether A committed a crime. The circumstances are such that the crime must have been committed either by A, B, C or D. Every fact which shows that the crime could have been committed by no one else, and that it was not committed by either B, C or D, is relevant.

This section is limited in effect by sec. 54 of the Act. It renders inadmissible one crime not reduced to certainty by a legal conviction, to prove the existence of another unconnected crime, even though it is cognate. Accordingly the possession of a number of documents supposed to be forged, is no evidence to prove the forgery of a document with which the possessor is charged.

In the case of *Reg. v. Parbhadas*, 11 Bom. H. C. R. 90, West, J., observed: "Sec. 11 of the Evidence Act is, no doubt, expressed in terms so extensive that any fact which can, by a chain of ratiocination, be brought into connection with another, so as to have a bearing upon a point in issue, may possibly be held to be relevant within its meaning. But the connections of human affairs are so

infinitely various and so far-reaching that thus to take this section in its widest admissible sense, would be to complicate every trial with a mass of collateral inquiries limited only by the patience and the means of the parties. That such an extensive meaning was not in the mind of the Legislature, seems to be shown by several indications in the Act itself."

**Facts intended to be included in this section.**—The sort of facts which this section was intended to include, are facts which either exclude or imply more or less distinctly, the existence of the facts sought to be proved. The meaning of the section would have been more fully expressed, if words to the following effect had been added to it:—"No statement shall be regarded as rendering the matter stated highly probable within the meaning of this section, unless it is declared to be a relevant fact under some other section of this Act."—Stephen's Evidence Act, 123.

**Highly probable.**—The words 'highly probable' point out that the connection between the facts in issue and the collateral facts sought to be proved must be so immediate as to render the co-existence of the two, highly probable.

**Highly improbable.**—By this expression is meant something which, though not absolutely impossible, is next door to it. The inconsistency referred to, means a physical impossibility of the co-existence of two facts, as for instance, that a man should be in two places at the same time, or within an interval of time too short to allow of his transport by any known means of locomotion from one to the other.

#### Decrees not *interpartes* when inadmissible—

(a). In the case of *Gujju Lal v. Fateh Lal*, I. L. R. 6 Cal. 171, A sued B to recover possession of certain property. It was admitted that A would be entitled to this property as heir of one X, if one C had survived Y, but that if C had predeceased Y, A would not be so entitled. The plaintiff A, offered in evidence a judgment in a previous suit between B as plaintiff and certain third parties as defendants, in which, the question being whether B or C was the heir of X, it was decided that C was the nearest heir. B contended that A, not having been a party to the first suit, was not entitled to use the judgment in that suit as evidence in his own favour and against him (B) in the second suit. It was held by the majority of the Judges that the judgment not being *interpartes* was not evidence and therefore inadmissible. The judgment was neither a *fact* within the meaning of this section, nor a *transaction* within the meaning of sec. 13. This decision has been followed in

(1) I. L. R. 11 Cal. 562 ; (2) I. L. R. 12 Cal. 207 ; (3) I. L. R. 13 Cal. 352 ; and concurred in (1) I. L. R. 4 All. 96 ; (2) I. L. R. 11 Mad. 116 ; (3) I. L. R. 12 Mad. 9. It has been distinguished in (1) I. L. R. 10 All. 585 ; (2) I. L. R. 15 Mad. 19.

(b). The plaintiffs, as purchasers of a share of an estate, sued to recover their share of the rent of certain tenures held in that estate by the defendants. The defendants denied being in possession as alleged. Another co-sharer in the same estate had previously brought a suit against the same defendants for the rent of the same tenures and in that suit the present plaintiffs and other co-sharers of the estate were made co-defendants, and the decision in that suit was that the present defendants were in possession and were liable to pay to the then plaintiff his share of the rent. *Held* (Mitter, J., dissenting) that the decree in the former suit was not admissible as evidence in the present suit—*Surendra Nath Pal Chowdhry and others v. Brojo Nath Pal Chowdhry and another*, I. L. R. 18 Cal. 352. This Full Bench decision followed *Gujju Lal v. Fateh Lal*, I. L. R. 6 Cal. 171.

(c). In a suit for rent the plaintiff claimed that he was entitled to payment both in cash and kind ; and in order to show that he was entitled to recover rent in kind, tendered two *ex parte* decrees obtained by his predecessor against the persons registered as tenants of the tenure at the time the decrees were obtained, such decrees being for rent both in cash and in kind. It appeared that the defendant was the owner of the tenure at the time the two decrees were passed, having acquired the tenure by foreclosure although he had not registered the transfer in the plaintiff's books, and that he was not made a party to the suits in which the decree was passed. *Held*, that as the defendant was not a party to the suits in which the decrees were obtained, and did not claim through the parties against whom they were passed, they were not admissible in the suit as evidence against him—*Ram Narain Rai and others v. Ram Coomer Chundra Poddar*, I. L. R. 11 Cal. 562. This decision followed *Gujju Lal v. Fateh Lal*.

(d). In a suit for *khas* possession of land upon the allegation that the defendant refused to give up possession or to pay rent for it, a decree declaring that the land in suit was liable for rent was tendered in evidence. The decree had been obtained by an auction-purchaser against the defendants, but the plaintiff did not claim title through the auction-purchaser who had in fact been treated as a trespasser and ejected. *Held*, relying upon the ruling in *Gujju Lal v. Fateh Lal*, 6 Cal. 171, that the decree was inadmissible in evidence—*Mohendralal Khan v. Rosomoyi Dasi and others*, I. L. R. 12 Cal. 207.

(c). The plaintiff sued to recover arrears of rent for a certain shop alleging the annual rent to be Rs. 250. The defendant contended that it was only Rs. 60. The defendant and the plaintiff's brother were partners in business, and the plaintiff relied upon the evidence of his brother and on two entries in the firm's books in the writing of his brother. To prove the *bond fides* of these entries, the plaintiff tendered in evidence a judgment passed against the defendant in a suit brought by the defendant against the plaintiff's brother charging him with having improperly debited their firm with Rs. 250 as the rent of the shop. *Held*, that the judgment was not admissible under this section or under secs. 13 and 40, as evidence against the defendant in the present suit—*Ranchohoddas Krishnadas v. Bapu Narkar*, I. L. R. 10 Bom. 439.

**Decrees not *interpares* when admissible—**

(a). In the case of *Heralal Pal and others v. A. Hills*, 11 C. L. R. 528, the plaintiff, who was an auction-purchaser of a share in certain lands, sued for arrears of rent the owners of another share in the same. It was admitted that certain plots of the estate were held in exclusive possession. The defendants claimed these plots as *lakheraj*. The plaintiff put in evidence certain decrees, not against the defendants, in respect of such plots, in which it was held against the person in possession at the time, that the lands were *mal*. The decrees were held admissible in evidence, not as showing that the lands were *mal* or *lakheraj* but as showing that rent had been successfully claimed in respect of the lands. Field, J., observed: "We take it that these decrees are not evidence of any decision of a Court of Justice, that the land is *mal* or *lakheraj*. We regard them as evidence merely of the fact already stated that rent was successfully claimed in respect of lands which are now said to be *lakheraj*. We do not consider that in so doing we are in any way violating the principle laid down in the Full Bench decision of *Gujju Lal v. Fateh Lal*, I. L. R. 6 Cal. 171. On the contrary, and in order to prevent there being any misapprehension, we desire to say that we entirely concur in the principle of that decision so far as it was concerned with the facts which were then before the Court. There are exceptions to the general rule that judgments *interpares* are not admissible as between persons who were not parties, and do not claim under the parties to the previous litigation. We do not attempt to define the exact limits of any particular exception to the general rule. All we do say is that in this particular case and under the particular circumstances with which we have now to deal, we consider that these decrees were properly admitted as evidence. As to their weight or value we pronounce no opinion."

(b). In a suit for possession of land, the defendants, in order to show the character of their possession, offered in evidence a judgment obtained by them in a suit to which the plaintiff or his predecessors in title were not parties, it was held that the judgment was admissible in evidence to show the nature of the enjoyment which the defendant then had in the land—*Peari Mohan Mukerji v. Drobomoi Devi*, I. L. R. 11 Cal. 745. This case relied on the authority of *Davies v. Lowndes*, 1 Bing. N. C. 606, and *Rameshwar Prasad Narain Singh v. Kunjo Behari Patack*, I. L. R. 4 Cal. 633.

(c). In a suit brought by the plaintiff against several defendants to prevent encroachments by the defendants in a lane which was the common property of himself and the defendants. Held, that the admission of one of the defendants in a previous suit to which the other defendants were not parties, as to the common character of the portion of the lane between his house and the plaintiff's and also a similar statement in a deed put in by another of the defendants to prove his title to his own house, were admissible in evidence to establish the common character of the entire lane as alleged by the plaintiff. The fact of common ownership of other parts of the lane should be treated as relevant to the issue as to the common character of the entire lane on the principle laid down in this section—*Naro Vinayak Patirardhan v. Narhari bin Raghunath*, I. L. R. 16 Bom. 125.

(d). The statement of a witness for the defence that a witness for the prosecution was at a particular place at a particular time, and consequently could not then have been at another place, where the latter states he was, and saw the accused persons, is properly admissible in evidence, even though the witness for the prosecution may not himself have been cross-examined on the point. Such evidence is admissible under this section as also under secs. 5 and 153, ill. (c) of the Act—*Reg. v. Sakharam Mukundji*, 11 Bom. H. C. R. 166.

(e). Where a person charges another with having forged a promissory note, who denies having ever executed any promissory note at all, the evidence that a note similar to the one alleged to be forged, was in fact executed by that person is not admissible, nor even would a judgment, founded upon such a fact, be admissible—*Reg. v. Parbhadas*, 11 Bom. H. C. R. 90.

12. In suits in which damages are claimed, any fact which will enable the Court to determine the amount of damages which ought to be awarded is relevant.

In suits for damages, facts tending to enable Court to determine amount are relevant.



See sec. 55 of the Act.

**Facts tending to enhance damages.**—(a). In an action for defamation, other libellous expressions by the defendant, whether used before or after the commencement of the suit, are admissible to prove *malice* and so enhance damages.

(b). In suits for breach of contract, all facts showing the amount of loss occasioned to the plaintiff by the breach, are relevant to determine damages.

(c). In an action for breach of promise of marriage, the plaintiff may give evidence of the defendant's station in life and his means, to show the loss she has sustained.

**Mitigation of damages.**—(a). In mitigation of damages the defendant may show facts tending to disprove *malice*, e.g., that rumours of the fact asserted were prevalent in the neighbourhood—*Richards v. Richards*, 2 M. and R. 557 ; or that the statement was copied from another paper—*Saunders v. Mills*, 6 Bing. 213.

(b). The defendant may give evidence that the plaintiff, at the time of the publication of the libel, labored under a general suspicion of having committed the act imputed to him.

(c). In an action for assault, the provocation offered by the plaintiff would be relevant.

(d). In a case for breach of promise of marriage, the defendant may prove that his relations disapproved of the match—*Irring v. Greenwood*, 1 C. and P. 350 ; give evidence of the conduct or character of the plaintiff—*Leeds v. Cook*, 4 Esp. 256.

(e). In the case of action against a Railway Company for injuries received, the position and circumstances and earnings of the plaintiff, the precautions taken by the Company and the contributory negligence, if any, of the plaintiff are relevant facts in determining the amount of damages.

**True measure of damages.**—The true measure of damages is the amount of compensation to be paid to the plaintiff for the injury he has sustained, and in an action of tort it is immaterial whether the damages come out of a deep pocket or not.

Facts relevant  
when right or  
custom is in  
question.

13. Where the question is as to the existence of any right or custom, the following facts are relevant :—

(a). Any transaction by which the right or custom in question was created, claimed, modified,

recognized, asserted or denied, or which was inconsistent with its existence.

(b). Particular instances in which the right or custom was claimed, recognized, or exercised, or in which its exercise was disputed, asserted or departed from.

### *Illustration.*

The question is, whether A has a right to a fishery. A deed conferring the fishery on A's ancestors, a mortgage of the fishery by A's father, a subsequent grant of the fishery by A's father, irreconcilable with the mortgage, particular instances in which A's father exercised the right, or in which the exercise of the right was stopped by A's neighbours, are relevant facts.

**Right.**—There is a conflict of rulings as to the meaning of the word 'right.' It seems that the word 'right' is here used to mean any right of property or any right over property, and is not restricted to incorporeal right only. Sir James F. Stephen has expanded this section into two articles (*i.e.*, 5 and 6) in his Digest of the Law of Evidence. Art. 5 is headed 'title' and runs thus "when the existence of any right of property or of any right over property is in question, every fact which constitutes the title of the person claiming the right, or which shows that he or any other person through whom he claims, was in possession of the property, and every fact which constitutes an exercise of the right, or which shows that its exercise was disputed, or which is inconsistent with its existence or renders its existence improbable, is deemed to be relevant." Art. 6 is headed 'custom' and is worded as follows "when the existence of any custom is in question, every fact is deemed to be relevant which shows how in particular instances, the custom was understood and acted upon by the parties then interested."

(a). In the case of *Surja Narain Sanda v. Bisswambhur Singh*, 23 W. R. 311, their Lordships held that the right mentioned in this section is not a public right only, it includes private rights also.

(b). In the case of *Ranchhodas Krishnadas v. Bapu Narkar*, I. L. R. 10 Bom. 439, their Lordships remarked that "in the absence of qualification such as is to be found in sec. 48 'rights and customs' in sec. 13 must, we think, be understood as comprehending all rights of ownership."

(c). In the Full Bench case of *The Collector of Goruckpur v. Palackdhari Singh*, I. L. R. 12 All. 1, Edge, C. J., remarked: "I think, however, as did Sir Charles Sargent, C. J., and Mr. Justice Nanabhai Haridas in *Ranchhoddas Krishnadas v. Bapu Narhar*, 10 Bom. 439, that the majority of the Full Bench of the Calcutta High Court in *Gujjural v. Fateh Lal* (6 Cal. 171) put too narrow a construction on the word 'right' in sec. 13, and that 'right' there includes not only incorporeal rights but a right of ownership. There are no words in sec. 13 which could not be applied to a right of ownership, but it is difficult to see what could within the meaning of sec. 13, cl. (a), be a transaction by which the right of a man to have it declared that he is the son of another man out of a particular woman, or that he is not some other man, could be said to be created or modified. Whatever be the meaning of the word 'right' in clause (a) of sec. 13, the meaning of the word 'right' in clause (b) must according to the principles of construction be the same."

(d). In the well known Full Bench case of *Gujjural v. Fateh Lal*, I. L. R. 6 Cal. 171, a contrary view was taken. Garth, C. J., said: "The right mentioned in this section is one which can be 'created' or 'exercised'; which expressions are perfectly appropriate when speaking of an incorporeal right, but would be wholly inapplicable to the word 'right' when used in the more extended sense."

**Transaction.**—(a). In the case of *Gujjural v. Fateh Lal*, I. L. R. 6 Cal. 171, Jackson, J., said: "A transaction as the derivation denotes is something which has been concluded between persons by a cross of reciprocal action as it were." Garth, C. J., remarked: "A transaction in the ordinary sense of the word is some business or dealing which is carried on or transacted between two or more persons. If the parties to a suit were to adjust their differences *inter se*, the adjustment would be a transaction." The majority of the Full Bench held, that "a judgment as to whether a certain person was or was not the heir to another is neither a transaction nor a fact within the meaning of this section." See also *Ramasami v. Appavu*, I. L. R. 12 Mad. 9; *The Collector of Goruckpur v. Palackdhari Singh*, I. L. R. 12 All. 1.

(b). In the case of *Ranchhoddas v. Bapu Narhar*, I. L. R. 10 Bom. 442, their Lordships observed that "as to the term 'transaction,' it is doubtless one of large import and might, although by a somewhat strained use of it, be held to be applicable to proceedings in a suit; but as the result of holding it to be so applicable in sec. 13, would be to effect a most important departure from the English rules of evidence, which would make judgments, decrees and

verdicts of juries only admissible in matters of public interest, it may well be doubted whether such was the intention of the framer of the Code. It is true that although the Code is in the main, drawn on the lines of the English Law of Evidence, there is no reason to suppose that it was intended to be a servile copy of it; but in any case, had such an important and radical change been intended, as Couch, C. J., in the case of *Niamat Ali v. Guru Das*, 22 W. R. 365, admits is the necessary result of construing 'transaction' in sec. 13 as including judgments, we should have expected it to be carried out by a special section framed for that purpose amongst those relating to judgments."

(c). In *Niamat Ali's* case it was held that the word 'transaction' is certainly large enough to allow the proceedings in such suits as these to be admitted as evidence, not as conclusive but as of such weight as the Court may think they ought to have.

**Custom.**—A custom is a rule which in a particular family or in a particular district has, from long usage, obtained the force of law. It must be ancient, certain and reasonable, and being in derogation of the general rules of law must be construed strictly. *Vide Hurroprosad v. Seodyal*, 3 I. A. 259. In the case of *Lala v. Hira Singh*, 2 All. 49, their Lordships observed that amongst the conditions essential for establishing a custom are, that the custom is of remote antiquity, that it has been continued and acquiesced in, that it is reasonable and is certain, and not indefinite in its character." In the case of *Ramalakshmi Ammal v. Sivanatha Perumal Sethurayar*, 14 M. I. A. 370, their Lordships of the Privy Council said: "It is of the essence of special usages modifying the ordinary rules of succession that they should be ancient and invariable; and it is further essential that they should be established to be so, by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends." There is a catena of rulings holding that a custom must be proved by strict evidence; that what is sought to be established has existed unaltered and uninterrupted from time immemorial; and that the persons who followed it, did so under the conviction that they were acting in accordance with the law. It seems to us that if the strict rules of evidence were enforced in proving the essentials of a valid custom, there would be failure of justice in the majority of cases. The Legislature therefore allows custom to be proved by the enumeration of instances in which the alleged custom has been acted upon, and by the proof afforded by judicial or revenue records or private

accounts and receipts, that the custom has been enforced. But it is by adducing in evidence judgments in cases in which such custom has been asserted and recognised, that instances of recognition can be best enumerated; consequently, if judgments not *inter partes* be held inadmissible in proof of custom, the object of the Legislature will, in a manner, be frustrated. Under the English law verdicts, judgments, and other adjudications although *inter alias*, have always been receivable in evidence to show the existence or non-existence of customs of a public nature (*vide* Taylor, sec. 1496). It must be acknowledged that the law of evidence as administered in England lays down stricter rules regarding the admissibility of evidence, than the Indian Statute does, and it would seem strange to find judgments, which are admissible as evidence under the former law, deemed inadmissible under the latter.

As to what is sufficient evidence to establish custom, refer to the following cases :—

1. *Beni Madhav Banerji v. Jai Krishna Mukerji*, 7 B. L. R. 152.
2. *Jay Krishna Mukerji v. Durganarayan Nag*, 11 W. R. 348.
3. *Lachman Rai v. Akbar Khan*, I. L. R. 1 All. 440.
4. *Doe d Jago Mohan Rai v. Nimu Dass*, Montrieux's Cases of Hindu Law, 596.

For instances of custom and usage being held to be unreasonable refer to—

1. *Lackmipat Singh v. Sadatoolah Nashyo*, I. L. R. 9 Cal. 698.
2. *DeSouza v. Dhanjibhai*, I. L. R. 8 Bom. 408.
3. *Chenna Ummayi v. Tegari Chetti*, I. L. R. 1 Mad. 168.

**Family Custom or Kulachar.**—Refer to—

1. *Ramanalaksmi Ammal v. Sivanantha P. Setharayer*, 17 W. R. 553 (P. C.)
2. *Nagendra Naryan v. Raghunath Naryan De*, W. R. (1864) 20.
3. *Amrita Nath Chowdhari v. Gouri Nath Chowdhari*, 6 B. L. R. 238.
4. *Surendranath Rai v. Hiramani Burmanea*, 12 M. I. A. 81.
5. *Raj Kishen Singh v. Ramjai Sarma*, I. L. R. 1 Cal. 195.
6. *Kadami Dasi v. Jotiram Kolita*, I. L. R. 3 Cal. 305.
7. *Abdul Adud v. Mahomed Makmil*, I. L. R. 10 Cal. 562.
8. *Raja Muttu Ramalinga Setupati v. Perianyangum Pillai*, L. R. 1 I. A. 209.
9. *Raja Varma Valia v. Rani Varma Muthu*, I. L. R. 1 Mad. 235.
10. *Hasan Ali v. Naga Mal*, I. L. R. 1 All. 288.

11. *Chotay Lal v. Chunnu Lal*, I. L. R. 4 Cal. 744.
12. *Bachebi v. Makhan Lal*, I. L. R. 3 All. 55.
13. *Ashabai v. Haji Tyeb Haji Rahimtulla*, I. L. R. 9 Bom. 115.
14. *Mahomed Sidick v. Haji Ahamed*, I. L. R. 10 Bom. 1.
15. *Hira v. Kallu*, I. L. R. 7 All. 916.
16. *Gur Dyal Mal v. Jhandu Mal*, I. L. R. 10 All. 585.

**Mercantile custom.—Sec—**

1. *Jagomohan Ghosh v. Manickchand*, 4 W. R. (P. C.) 8.
2. *Volkart Brothers v. Vettivelu Nadan*, I. L. R. 11 Mad. 459.
3. *Mackenzie Lyall & Co. v. Chamru Singh & Co.*, I. L. R. 16 Cal. 702.
4. *Smith v. Ludha Ghella Damodar*, I. L. R. 17 Bom. 129.

**Decrees and judgments not interpartes in what cases held admissible under this section—**

(a). In determining the right to the *audhicaree*, and the custom or rule of succession to the office, previous judgments or decrees involving instances in which the right or custom had been successfully asserted were held admissible as evidence under this section—*Kundoonath Sarma Goswami v. Dhirchandra Goswami*, 20 W. R. 345.

(b). In the case of *Niamat Ali v. Gooroodass*, 22 W. R. 365, the plaintiff sued to establish an itnamee right to certain lands, and produced certain transcript decisions of the Civil Court, in suits in which a former holder of the tenure of the person that was said to have created the right, was a party. Such decisions were held admissible, as the word transaction was thought to be wide enough to include such proceedings.

(c). Where a suit was disposed of according to a compromise, of which the judgment set out the terms in the form of a recital, held, that the judgment was the record of a transaction by which the rights of the parties were recognised and was therefore relevant—*Roopchand Bhukut v. Hurkissen Dass*, 23 W. R. 162.

(d). In the case of *Gopalayyan v. Raghupatyyan*, 7 Mad. H. C. R. 250, it was held that evidence of acts of persons who were acting under the conviction that their acts were legal; of acquiescence in those acts; of decisions of Courts, or even of panchyats upholding such acts; of statements of experienced and competent persons of their belief that such acts were legal and valid will be admissible to prove the uniformity and continuity of any usage in question.

(e). Where the plaintiff, who was an auction-purchaser of a share in certain lands, sued for arrears of rent against the owners of another share in the same, it was admitted that certain plots of the estate

were held in exclusive possession. The defendants claimed these plots as lakhiraj. The plaintiff put in evidence certain decrees in respect of such plots in which it was held against the persons in possession at the time that the lands were *mal*. Held, that having regard to the circumstances and the particular defence set up that the decrees were admissible in evidence not as showing that the lands were *mal* or lakhiraj, but as showing that rent had been successfully claimed in respect of the lands—*Hiralol Pal v. A. Hills*, 11 C. L. R. 528. In this case Field J. remarked “that there are exceptions to the general rule that judgments *inter partes* are not admissible as between persons who were not parties, and do not claim under the parties to the previous litigation. We do not attempt to define the exact limits of any particular exception to the general rule. All we do say is that in this particular case and under the particular circumstances with which we have now to deal we consider that these decrees were properly admitted as evidence.” His Lordship said that he entirely concurred in the principle laid down in the Full Bench decision in *Gujju Lal v. Fateh Lal*, 6 Cal. 171, so far as it was concerned with the facts which were then before the Court.

(f). In a suit for possession of land, the defendant, in order to show the character of his possession, offered in evidence a judgment obtained by him in a suit in which the plaintiff or his predecessors in title were not parties. Cunningham J. said that “the document is admissible in evidence as showing the nature of the possession of the defendant’s predecessors in title. As a rule, judgments are evidence only between parties, but there is an exception to this.” He then quoted the case of *Davies v. Lowndes*, 1 Bing. N. C. 606, wherein it was decided that decrees in Chancery between other parties, concerning the same lands, were admissible in evidence to show the character in which the possessor enjoyed the lands. He also quoted the Privy Council case of *Rameshkur Prasad Naryan Singh v. Kunjabehary Patack*, L. R. 6 I. A. 33; *Pearymohan Mukerji v. Drobomoye Dabi*, I. L. R. 11 Cal. 745.

(g). In *Hunsa Koer v. Sheogorind Raut*, 24 W. R. 431, two decrees in rent suits in which the plaintiff in the suit before the Court had sued certain ryots, were admitted in evidence.

(h). In *Gur Dayal Mal v. Jhandu Mal*, Weekly Notes (1888) 242, it was held by the Allahabad High Court that evidence could be given of instances in which a purely local custom was recognised in suits not *inter partes*.

(i). P brought a suit against K, a Hindu widow, to establish his right of inheritance in certain villages which had belonged to K’s

husband, and to have it declared that her husband died childless, and that K had falsely put forward a child of unknown parentage as her husband's son. K was the only defendant, and she maintained that the child in question was her son by her deceased husband. The suit was dismissed on the merits by the Court of first instance and by the High Court on appeal. After K's death, P brought a suit against D, whom the Collector as Manager of the Court of Wards had accepted as the minor son of K, and against the Collector as such Manager, for possession of the same villages upon the same grounds as those put forward in the former suit. Held by the Full Bench, that the judgments of the Court of first instance and the High Court in the former suit were admissible in evidence in the present suit. Edge C. J. remarked: "I am of opinion that the record of the previous suit in which the judgment of this Court of the 7th December 1874 was delivered, but not the judgment alone, is admissible under sec. 13 (b) for the purpose and to the extent already indicated"—*The Collector of Goruckpur v. Palackdhari Singh*, I. L. R. 11 All. 1.

(j). Judgments in suits in which a right was asserted to collect dues to a temple are relevant in a suit for the same purpose against other persons—*Ramaswami v. Appaya*, I. L. R. 12 Mad. 9.

(k). In a suit for rent the amount of the land held by the defendant was questioned, and it was contended that the land must be measured with a *hath* of 21½ inches and not one of 18 inches, as claimed by the plaintiff zaminder. Certain decrees obtained by the zaminder against other tenants in the same pergunnah in suits in which 18 inches had been taken as the *hath* were tendered in evidence in support of the plaintiff's contention that the customary *hath* in the pergunnah was one of 18 inches. Held, that such decrees were admissible in evidence under the provisions of this section as they furnished evidence of particular instances, in which a custom was claimed—*Jianutullah Sikdar v. Ramanikant Rai*, I. L. R. 15 Cal. 233.

(l). In a suit for pre-emption based on custom, decrees passed in favour of such a custom, in suits in which it was alleged and denied, were held admissible as evidence to prove its existence—*Gurudoyal Mal v. Jhanda Mal*, I. L. R. 10 All. 585.

(m). Judgments and decrees recognising rights between parties to a suit or between persons whom they represent, although they are not conclusive under the Act as they were before the passing of it, are yet admissible in evidence under this section for the purpose of showing that the right has been not only asserted by the



claimants, but recognised by the tribunals of the country on several occasions, even if the parties in the former suit be entire strangers—*Naranji Bhikabai v. Dipa Umed*, I. L. R. 3 Bom. 2.

**Decrees and judgments in what cases held inadmissible—**

(a). Where the question at issue was whether the plaintiff was entitled to succeed as heir to B, and the issue was dependent upon whether or not S survived M, the plaintiff relied upon a judgment in a former suit between the defendant and a third party, in which the question, whether S survived M, was decided in the affirmative. Held by the Full Bench (Mitter J. dissentiente) that the judgment in the former suit was not a transaction within the meaning of this section, and that it was inadmissible in evidence in the present suit—*Gujju Lal v. Fateh Lal*, 6 Cal. 171.

(b). In a suit for rent the plaintiff claimed that he was entitled to payment both in cash and kind; and in order to show that he was entitled to recover rent in kind, tendered two *ex parte* decrees obtained by his predecessor against the persons registered as tenants of the tenure at the time the decrees were obtained, such decrees being for rent both in cash and in kind. It appeared that the defendant was the owner of the tenure at the time the decrees were passed, having acquired the tenure by foreclosure although he had not registered the transfer in the plaintiff's books, and that he was not made a party to the suits in which the decrees were passed. Held, that as the defendant was not a party to the suits in which the decrees were obtained, and did not claim through the parties against whom they were passed, they were not admissible in the suit as evidence against him—*Ramnaryan Rai v. Ramkumar Chandra Poddar*, I. L. R. 11 Cal. 562.

(c). In a suit for khas possession of land upon the allegation that the defendant refused to give up possession, or to pay rent for it, a decree declaring that the land in suit was liable for rent was tendered in evidence. The decree had been obtained by an auction-purchaser against the defendants, but the plaintiff did not claim title through the auction-purchaser who had in fact been treated as a trespasser and ejected. Held, that the decree was inadmissible in evidence—*Mohendra Lal Khan v. Rosomoyi Dassi*, I. L. R. 12 Cal. 207. This case followed the Full Bench decision in *Gujju Lal v. Fateh Lal*, I. L. R. 6 Cal. 171.

(d). The plaintiffs, as purchasers of a share of an estate, sued to recover their share of the rent of certain tenures held in that estate by the defendants. The defendants denied being in possession as alleged. Another co-sharer in the same estate had previously brought a suit

against the same defendants for the rent of the same tenures, and in that suit the present plaintiffs and other co-sharers of the estate were made co-defendants, and the decision in that suit was that the present defendants were in possession, and were liable to pay to the then plaintiff his share of the rent. Held by the majority of the Full Bench, Mitter J. dissenting, that the decree in the former suit was not admissible in evidence in the present suit—*Surendranath Pal Chowdhury v. Brojonath Pal Chowdhury*, I. L. R. 13 Cal. 352.

(e). The case of *Subramanyan v. Paramwaran*, I. L. R. 11 Mad. 116, follows the principle laid down in *Gujju Lal v. Fateh Lal*, 6 Cal. 171.

**Evidence of particular instances.**—There ought to be such a common character between the instances of which evidence is offered, and the instance to which the inquiry relates as to suggest a reasonable inference that the same state of things existed in each. The following remarks of Baron Parke in *Jones v. Williams*, 2 M. and W. 326, may be read with advantage. "I am also of opinion that this case ought to go down to a new trial, because I think the evidence offered of acts in another part of one continuous hedge, and in the whole bed of the river, adjoining the plaintiff's land, was admissible in evidence, on the ground that they are such acts as might reasonably lead to the inference that the entire hedge and the bed of the river, and consequently the part in dispute, belonged to the plaintiff. Ownership may be proved by proof of possession, and that can be shown only by acts of enjoyment of the land itself; but it is impossible, in the nature of things, to confine evidence to the very precise spot on which the alleged trespass may have been committed: *evidence may be given of acts done in other parts, provided there is such a common character of locality between those parts and the spot in question, as would raise a reasonable inference in the minds of the jury that the place in dispute belonged to the plaintiff if the other parts did.* In ordinary cases, to prove his title to a close, the claimant may give in evidence acts of ownership in any part of the same enclosure; for the ownership of one part causes a reasonable inference that the other belongs to the same person; though it by no means follows as a necessary consequence, for different persons may have bulks of land in the same enclosure; but this is a fact to be submitted to the jury. So, I apprehend, the same rule is applicable to a wood which is not enclosed by any fence; if you prove the cutting of timber in one part, I take that to be evidence to go to a jury to prove a right in the whole wood, although there be no fence, or distinct boundary, surrounding the whole, and the case of *Hanley v. White*, 14 East. 332, I conceive, is to be explained on this principle; there was a continuous belt of trees, and acts of ownership on one part were held to be admissible to prove that the

plaintiff was the owner of another part, on which the trespass was committed. So, I should apply the same reasoning to a continuous hedge: though, no doubt, the defendant might rebut the inference that the whole belonged to the same person, by showing acts of ownership on his part along the same fence. In the case of *The Collector of Goruckpur v. Palackdhari Singh*, I. L. R. 12 All. 1, Edge C. J. remarked: "It could not have been the intention of the Legislature in framing sec. 13 that a party to a suit could not give evidence of particular instances in which a custom, for example, was exercised or recognised, unless he showed that the other party to the suit had recognised, or had exercised or had had exercised against him that custom, or that such party could not give in evidence the record of a suit in which such custom had been claimed and recognised, without showing that the former suit was *inter partes*." The following remarks of Turner, J., in the case of *Lachman Rai v. Akbar Khan*, I. L. R. 1 All. 440, are worthy of attention. "The most cogent evidence of custom is not that which is afforded by the expression of opinion as to the existence, but by the examination of instances in which the alleged custom has been acted upon, and by the proof afforded by judicial or revenue records or private records or receipts, that the custom has been enforced. The acts required for the establishment of customary law should be plural, uniform and constant. They may be judicial decisions, but these are not indispensable for its establishment, although some have thought otherwise. The authors of the acts must have performed them with the consciousness that they spring from a legal necessity."

(a). In a suit by the plaintiffs who were entitled to *pallahs* or turns of worship, against defendant who was also entitled to *pallahs*, the plaintiffs contended that according to the custom which had governed the worship, the idols could not be removed from Calcutta, and sought to restrain the defendants from removing them, and tendered in evidence a deed executed by a majority of those entitled to *pallahs*, in which, after reciting the alleged custom, the parties to the deed covenanted with one another not to remove the idol from Calcutta during their respective *pallahs*. The defendant was not a party to the deed. The deed was held admissible under this section, but was considered to be of very little value as evidence against the defendant—*Haramath Mullick v. Nityanand Mullick*, 10 B. L. R. 263.

(b). The accused were charged with having received illegal gratifications from C. & Co. on three specific occasions in 1876. In 1876, 1877 and 1878, C. & Co. were doing business as Commissariat contractors, and the accused was the Manager of the Commissariat Office. Held, that evidence of similar but unconnected instances of receiving illegal

gratifications from C. & Co. in 1877, and 1878 was not admissible against him under secs. 5 to 13—*Empress v. M. F. Vyapoory Moodaliar*, I. L. R. 6 Cal. 655.

**Robcaree.**—In a suit for a balance of rent on the allegation that defendants cultivated a portion of plaintiff's jagheer as bhowlee tenants, where defendants denied that they were such tenants and pleaded mokurrari pottah. *Held*, that a robcaree in a case in which certain decree-holders sought to attach the mokurrari-rights of an ancestor of the defendants in this jagheer, was relevant evidence under this section—*Luchmidhar Pattuck v. Raghubar Singh and another*, 24 W. R. 284.

(d). Under this section, road-cess papers and a deed of sale are evidence *quantum valeat*—*Dairari Mahanta v. Juggobundhu Mahanta and others*, 23 W. R. 293.

(e). A map prepared by an officer of Government while in charge of a khas mahal, Government being at the time in possession of the mahal merely as a private proprietor, is not a map purporting to have been made under the authority of Government, the accuracy of which must be presumed under sec. 83, but such a map may be admitted as evidence under this section—*Junmajoy Mullick v. Dwarkanath Myles*, I. L. R. 5 Cal. 287.

(f). In a suit for possession of land, the plaintiffs claimed title under a lease from the shrotriendars of the village where the land was situated. The defendants who had obstructed the plaintiffs from taking possession of part of the land, claimed to have permanent occupancy rights, and asserted that the shrotriendars were entitled not to the land itself but to melvaram only. To meet this allegation, the plaintiffs tendered in evidence documents executed by other tenants in the same village showing that they were purakudis only. *Held*, that the documents above referred to were admissible under this section—*Vythilinga v. Venktachala*, I. L. R. 16 Mad. 194.

(g). In *Rameshur Prosaud Narain Singh v. Kunja Behari Patuck*, I. L. R. 4 Cal. 633, the question was between the proprietors of two estates, A and B, as to the right to the flow of water from an artificial reservoir through an artificial watercourse on estate B, belonging to the defendant. In 1831, proceedings had been taken in the criminal court by the owners of estate A against some tenants of estate B who had closed the watercourse. These proceedings were terminated by a *razinama* or deed of compromise, which was admitted as evidence by their Lordships of the Privy Council, on the ground that "although it was apparently made between tenants, it seems

to have been subsequently acted upon, and may be properly used to explain the character of the enjoyment of the water."

14. Facts showing the existence of any state of mind—such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling—are relevant, when the existence of any such state of mind or bodily feeling, is in issue or relevant.

Facts showing existence of state of mind, or of body or bodily feeling.

*Explanation.*—A fact relevant as showing the existence of a relevant state of mind must show that it exists, not generally, but in reference to the particular matter in question.

### *Illustrations.*

(a). A is accused of receiving stolen goods knowing them to be stolen. It is proved that he was in possession of a particular stolen article. The fact that, at the same time, he was in possession of many other stolen articles is relevant, as tending to show that he knew each and all of the articles of which he was in possession to be stolen.

(b). A is accused of fraudulently delivering to another person a piece of counterfeit coin which, at the time when he delivered it, he knew to be counterfeit. The fact that, at the time of its delivery, A was possessed of a number of other pieces of counterfeit coin, is relevant.

The fact that A had been previously convicted of delivering to another person as genuine a counterfeit coin knowing it to be counterfeit is relevant.

(c). A sues B for damage done by a dog of B's, which B knew to be ferocious. The facts that the dog had previously bitten X, Y and Z, and that they had made complaints to B, are relevant.

(d). The question is, whether A, the acceptor of a bill of exchange, knew that the name of the payee was fictitious. The

fact that A had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee if the payee had been a real person, is relevant, as showing that A knew that the payee was a fictitious person.

(e). A is accused of defaming B by publishing an imputation intended to harm the reputation of B. The fact of previous publication by A respecting B, showing ill-will on the part of A towards B, is relevant, as proving A's intention to harm B's reputation by the particular publication in question. The facts that there was no previous quarrel between A and B, and that A repeated the matter complained of as he heard it, are relevant, as showing that A did not intend to harm the reputation of B.

(f). A is sued by B for fraudulently representing to B that C was solvent, whereby B, being induced to trust C, who was insolvent, suffered loss. The fact that, at the time when A represented C to be solvent, C was supposed to be solvent by his neighbours and by persons dealing with him, is relevant, as showing that A made the representation in good faith.

(g). A is sued by B for the price of work done by B, upon a house of which A is owner, by the order of C, a contractor. A's defence is that B's contract was with C. The fact that A paid C for the work in question is relevant, as proving that A did, in good faith, make over to C the management of the work in question, so that C was in a position to contract with B on C's own account, and not as agent for A.

(h). A is accused of the dishonest misappropriation of property which he had found, and the question is whether, when he appropriated it, he believed in good faith that the real owner could not be found. The fact that public notice of the loss of the property had been given in the place where A was, is relevant, as showing that A did not in good faith believe that the real owner of the property could not be found. The fact that A knew, or had reason to believe, that the notice was given fraudulently by C, who had heard of the loss of the property and wished to set up a false claim to it, is relevant, as showing that the fact that A knew of the notice did not disprove A's good faith.

(v). A is charged with shooting at B with intent to kill him. In order to show A's intent, the fact of A's having previously shot at B may be proved.

(j). A is charged with sending threatening letters to B. Threatening letters previously sent by A to B may be proved, as showing the intention of the letters.

(k). The question is, whether A has been guilty of cruelty towards B, his wife. Expressions of their feeling towards each other shortly before or after the alleged cruelty, are relevant facts.

(l). The question is, whether A's death was caused by poison. Statements made by A during his illness as to his symptoms, are relevant facts.

(m). The question is, what was the state of A's health at the time when an assurance on his life was effected. Statements made by A as to the state of his health at or near the time in question, are relevant facts.

(n). A sues B for negligence in providing him with a carriage for hire not reasonably fit for use, whereby A was injured. The fact that B's attention was drawn on other occasions to the defect of that particular carriage, is relevant. The fact that B was habitually negligent about the carriages which he let to hire, is irrelevant.

(o). A is tried for the murder of B by intentionally shooting him dead. The fact that A, on other occasions, shot at B is relevant, as showing his intention to shoot B. The fact that A was in the habit of shooting at people with intent to murder them, is irrelevant.

(p). A is tried for a crime. The fact that he said something indicating an intention to commit that particular crime, is relevant. The fact that he said something indicating a general disposition to commit crimes of that class, is relevant.

**Purport of the section.**—This section seems to apply to that class of cases which is discussed in Taylor on Evidence, 6th Ed., secs. 318-322, that is to say, cases where a particular act is more or less criminal or culpable according to the state of mind or feeling of the person who does it: as for instance, in actions of slander,

or false imprisonment or malicious prosecution, where malice is one of the main ingredients in the wrong which is charged, evidence is admissible to show that the defendant was actuated by spite or enmity against the plaintiff, or again, on a charge of uttering counterfeit coin, evidence is admissible to show that the prisoner knew the coin to be counterfeit, because, he had other similar coins in his possession, or had passed such coin before or after the particular occasion which formed the subject of the charge. The illustrations as well as the authorities cited in Taylor show with sufficient clearness the sorts of cases to which this section is applicable. Care should be taken not to extend the operation of this section to other cases where the question of guilt or innocence depends upon actual facts, and not upon the state of a man's mind or feeling. It cannot be proved that a man committed theft or any other crime on one occasion, by showing that he committed similar crimes on other occasions. *Vide* the remarks of Garth C. J. in *Empress v. Vyapooria Moodalyar*, I. L. R. 6 Cal. 655. States of mind, knowledge, intention, and the like are among the most important topics with which judicial inquiries are concerned. In criminal cases they are invariably a main consideration; and in civil cases they are often highly material, as for instance, where there is a question of fraud, malicious intention or negligence. The state of mind must be inferred from its outward manifestations. "The state of mind to be proved must be, not merely a general tendency or disposition towards conduct of a similar description to that in question, but a condition of thought and feeling having distinct, immediate reference to the matter which is under inquiry. The fact that a man is generally dishonest, generally malicious, generally negligent or criminal in his proceedings, does not bear with sufficient directness on his conduct on any particular occasion, or as to any particular matter to make it safe to take it as a guide in interpreting his conduct: what is wanted is a fact which will throw light on his motives and state of mind with immediate reference to that particular occasion or matter. Illustrations (a) and (b) make this clear. A man is accused of receiving stolen goods with guilty knowledge: if he is merely shown to be generally dishonest, the probability of his having been dishonest in this particular transaction is perhaps increased, but only in a vague and indefinite way; but if, at the time, he is found in possession of a number of other stolen articles, this fact throws a distinct light on his knowledge and intentions as to the articles of which he is found in possession. It would be dangerous to infer that because a man was generally dishonest, he was dishonest in any single case; but it is not dangerous to infer that a man, who is found in possession of



50 articles, which are shown to have been stolen from different people, came by each and all in a dishonest manner."—Cunningham's Evidence Act, 120-122.

It is a general principle of law that in criminal as in civil cases, the evidence shall be confined to the point in issue. In criminal proceedings this rule should be more strictly enforced, if possible, than in civil cases, as the consequences of the violation of the rule in criminal matters are more serious than those in civil matters. Mr. Russell in his work on Crimes says that "where a prisoner is charged with an offence, it is of the utmost importance to him that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment, and matters relating thereto, which alone he can be expected to come prepared to answer." This rule prevents a man charged with a particular offence from having either to submit to imputations which in many cases would be fatal to him, or else to defend every action of his whole life in order to explain his conduct on the particular occasion. The illustrations given in this section mention the exceptions which have been generalised from some English cases. They will show that evidence is allowed in criminal cases, to be given of the prisoner's conduct on other occasions, where it has no other connection with the charge under inquiry than that it tends to throw light on what were his motive and intention in doing the act complained of; because, without such evidence, it is difficult to prove the true character of facts which standing alone, might be accounted for, on the supposition of accident, mistake or want of guilty knowledge.

This section enumerates the particular forms of connection constituting relevancy of facts showing the existence of—I, States of mind; II, States of body or bodily feeling. Illustrations (c), (e), (i), (j), (o), (p), have reference to *intention*; illustrations (a), (b), (d), to *knowledge*; illustrations (f), (g), (h), to *good faith*; illustration (k), to *ill-will*; and illustration (n), to *negligence*. Illustrations (l) and (m) have reference to *states of body*. Illustrations (n), (o) and (p) show that no evidence of facts tending to prove general disposition or conduct of a description similar to that in question, can be admitted.

**Knowledge.**—Mr. Taylor says: "Evidence of this kind (evidence of collateral facts) is very frequently admitted in criminal proceedings. Thus, on an indictment for knowingly uttering a forged document, or a counterfeit bank note, or counterfeit coin, proof of the possession, or of the prior or subsequent utterance, either to the prosecutor himself or to other persons, of other false documents or notes, or bad money, though of a different description, and though themselves the

subjects of separate indictments, is admissible as material to the question of *guilty knowledge or intent*; but in these cases it is essential to prove distinctly that the instruments offered in evidence of guilty knowledge were themselves forged. It seems also, that though the prosecutor may prove the uttering of other forged notes by the prisoner, and his conduct at the time of uttering them, he cannot proceed to show what the prisoner said or did at another time, with respect to such uttering, for these are collateral facts, too remote for any reasonable presumption of guilt to be founded upon them, and such as the prisoner cannot by any possibility be prepared to contradict." Sec. 322.

(a). The prisoners were indicted for uttering bank notes, knowing them to be forged. The trial took place in April, and to prove their guilty knowledge, evidence was given that in February they had uttered, on three several occasions, forged notes to three different persons, and that on being asked at each place for their names and places of abode, they gave false names and addresses; and the Court was of opinion that this evidence was admissible. Lord Ellenborough said that it was competent for the Court to receive evidence of other transactions though they amounted to distinct offences, and of the demeanour of the prisoner on other occasions, from which it might fairly be inferred that the prisoner was conscious of his guilt whilst he was doing the act charged upon him in the indictment. Heath J. said: "The charge in this case puts in proof the *knowledge* of the person, and as that knowledge cannot be collected from the circumstances of the transaction itself, it must necessarily be collected from other facts and circumstances." Mr. Thompson B. made the following observations: "As to the cases put by the prisoner's Counsel of uttering bad money, I, by no means, agree in their conclusion, that the prosecutor cannot give evidence of another uttering on the same day, to prove the guilty knowledge. Such other uttering cannot be punished, until it has become the subject of a distinct and separate charge; but it affords strong evidence of the knowledge of the prisoner that money was bad. If a man utters a bad shilling and fifty other bad shillings are found upon him, this would bring him within the description of a *common utterer*; but if the indictment do not contain that charge, yet these circumstances may be given in evidence on any other charge of uttering to show that he uttered the money with a knowledge of its being bad"—*R. v. Whiley*, 2 Leach, 983.

(b). The prisoner was indicted for uttering a bill of exchange knowing it to be forged. It was proved that, when he was apprehended, there were found in his pocket-book three other forged bills, drawn upon the same parties. On a case reserved, the Judges were all

of opinion, that these forged bills found upon the prisoner at his apprehension were evidence of his guilty knowledge—*R. v. Hough, Russ. and Ry.*, 120.

(c). In *R. v. Foster*, 24 L. J. M. C. 134, the Court of Criminal Appeal held, that on an indictment for uttering a counterfeit crown-piece knowing it to be counterfeit, proof that the prisoner, on a day subsequent to the day of such uttering, uttered a shilling, was admissible to prove the guilty knowledge of the prisoner. "The uttering of a piece of bad silver" said the Court "although of a different denomination from that alleged in the indictment, is so connected with the offence charged, that the evidence of it was receivable."

(d). In *R. v. Egerton, Russ. and Ry.*, 375, the prisoner was indicted for robbing the prosecutor of a coat by threatening to accuse him of an unnatural crime. Evidence was admitted by Holroyd J., that the prisoner had made another, but ineffectual, attempt to obtain a 1£ note from the prosecutor on the following day to that on which he obtained the coat; and this ruling was confirmed by the Judges.

(e). Where the question was, whether the acceptor of a bill of exchange either knew that the name of the payee was fictitious, or else had given to the drawer a general authority to draw bills on him payable to fictitious persons, evidence was admitted to show that he had accepted other bills, drawn in like manner, before it was possible to have transmitted them from the place at which they bore date—*Gibson v. Hunter*, 2 H. Bl., 288.

(f). In *R. v. Francis*, L. R. 2 C. C. R. 128, the prisoner was charged with endeavouring to obtain an advance upon a ring from a pawnbroker, falsely representing that it was a diamond ring. In order to prove the fact of guilty knowledge, evidence was admitted to show that two days previous to the transaction in question, the prisoner had obtained an advance from a pawnbroker upon a chain which he falsely represented to be a gold chain, and that he tried to obtain from other pawnbrokers advances upon a ring which he falsely represented to be a diamond ring.

**Intention.**—The determination of the question as to the state of a man's mind at a particular moment must necessarily always be a matter of serious difficulty, and conclusions should not be formed without the most anxious and careful scrutiny of all the facts. Mr. Best says: "The psychological question of the *intent* with which acts are done, plays a much greater part in criminal than in civil proceedings. The maxim '*Actus non facit reum nisi mens sit rea*', runs through the criminal law, although in some

instances a criminal intention is conclusively presumed from certain acts, while in civil actions to recover damages for misconduct or neglect, it is in general no answer that the defendant did not intend mischief. "It is a maxim of law that every person must be taken to intend the natural consequences of his acts and the Judge is, as a rule, asked to infer intention from the conduct of the person, whose intention is in issue, prior to the act done and subsequent to it. A criminal intent is often presumed from acts which, morally speaking, are susceptible of but one interpretation. When, for instance, a party is proved to have laid poison for another, or to have deliberately struck at him with a deadly weapon, or to have knowingly discharged loaded fire-arms at him, it would be absurd to require the prosecutor to show that he intended death or bodily harm to that person. So, where a baker delivered adulterated bread for the use of a public asylum, it was held unnecessary to allege that he intended it to be eaten, as the law would imply that from the delivery. The setting fire to a building is evidence of an intent to injure the owner, although no motive for the act is shown; and the uttering a forged document is conclusive of an intent to defraud the person who would naturally be affected by it—an inference which is not removed merely by that party swearing that he believes the accused had no such intention. So, where a party deliberately publishes defamatory matter malice will be presumed. In such cases *res ipsa in se dolum habet*—the facts speak for themselves. Presumptions of this kind are so conformable to reason that moral conviction and legal intendment are here in perfect harmony. But the safety of society, joined to the difficulty of proving psychological facts, renders imperatively necessary a presumption which may seem severe; viz., that which casts on the accused the onus of justifying or explaining certain acts which are *prima facie* illegal. It is partly on this principle that sanity is presumed in preference to innocence even in the case of suicide. So a party who is proved to have killed another is presumed in the first instance to have done it maliciously or at least unjustifiably; and consequently all circumstances of justification or extenuation are to be made not by the accused, unless they appear from the evidence adduced against him." "This presumption must be taken in connection with the following infirmative hypotheses. 1st—The intention of the accused in doing the suspicious act is a psychological question, and may be mistaken. His intention may either have been altogether innocent, or if criminal, directed towards a different object. Thus a person may be poisoned; and another, innocent of his death, may, a short time before, have purchased a quantity of the same poison, for the purpose of des-

troying vermin. So predictions of approaching mischief to an individual, who is afterwards found murdered, may frequently be explained on the ground that the accused was really speaking the conviction of his own mind, without any criminal intention: prophecies of death are much more frequently the offspring of superstition than of premeditated assassination. *2nd*—As an example of criminal intention with a different object, murder by fire-arms is not uncommon; and a person innocent of a murder night, a short time previous to its commission, have purchased a gun for the purpose of poaching, or even have stolen one which is found in his possession. So A might purchase a sword or pistol for the purpose of fighting a duel with B; and before the meeting took place, the weapon might be purloined or stolen by C, in order to assassinate D.”—Best, 8th Ed., 77, 385, 404.

(a). Where the accused was charged under sec. 206 of the Indian Penal Code with fraudulently transferring three properties to three different persons on a certain day, in order to prevent their being seized in execution of a decree, and the prosecution tendered evidence of five other fraudulent transfers of property effected by the accused on the same day, apparently with the same object, *held*, that this evidence was admissible under secs. 14 and 15, to prove that the particular transfers which were specified in the charge were made with a fraudulent intent—*Queen-Empress v. Vajiram*, I. L. R. 16 Bom. 414.

(b). In *R. v. Mogg*, C. and P. 364, the prisoner was indicted for administering sulphuric acid to eight horses with intent to kill them. Evidence that the prisoner had frequently mixed sulphuric acid with the horses' corn was objected to, but Parke J. held it was admissible as showing whether the act was done with the intent charged in the indictment.

(c). One Parbhudas was charged with having forged a promissory note, and four other accused with having abetted the forgery. In the possession of four of the accused persons were found some one hundred and fifty papers which were alleged to be forgeries. It was held that these papers were improperly admitted as evidence, their Lordships remarking that evidence merely tending to establish another offence, may and generally will be met by counter evidence raising unmanageable collateral questions—*Reg. v. Parbhudas Anusaram*, 11 Bom. H. C. R. 90. The High Court evidently excluded this evidence on the supposition that the Legislature could not have intended that suspicion of one crime should be received as evidence of another. Suspicion of another crime is no doubt to be excluded, but if the fact proposed to be proved, if allowed to be proved, throws light on the accused's state of mind, such fact, it is presumed, ought

to be held admissible as evidence under this section. The case of Parbhudas seems to be of doubtful authority.

(d). In one case the prosecutors offered to prove the uttering of another forged note five weeks after the uttering, which was the subject of the indictment; but the Court (Ellenborough C. J., Thompson C. B. and Lawrence J.) held that the evidence was not admissible, unless the latter uttering was in some way connected with the principal case, or unless it could be shown that the notes were of the *same manufacture*—*R. v. Taverner*, 5 C. and P. 413.

(e). Where the prisoner was indicted in one Court for stealing, in another for receiving knowing it to have been stolen, certain cloth, it was proved that the cloth was stolen in the night of the 2nd and 3rd March; and found in the possession of the prisoner on the 10th March, and it was sought further to give in evidence, in order to show guilty knowledge, that on his house being searched on 10th March, other cloth which had been stolen in the December previous from other parties was found. The Court of Criminal Appeal held that such evidence was inadmissible. Alderson B. in giving judgment said: "The mere possession of stolen property is evidence *prima facie* not of receiving of but of stealing; and to admit such evidence in the present case would be to allow a prosecutor, in order to make out that a prisoner had *received property* with a guilty knowledge which had been stolen in March, to show that the prisoner had in the December previous stolen some other property from another place and belonging to other persons. In other words, we are asked to say that in order to show that the prisoner had committed one felony, the prosecutor may prove that he committed a totally different felony, sometime before; such evidence cannot be admissible"—*R. v. Oddy*, 2 Den. C. C. R. 264; 20 L. J. M. C. 198.

**Negligence.**—(a). Where facts are settled, the existence of *negligence* is a question of law, though reference is thereby implied to a standard of reasonable care and common experience with which the Judge most often necessarily be unacquainted.—Best, 8th Ed., 86.

(b). Where goods entrusted to a common carrier, to be carried for reward, are lost otherwise than by the act of God or the men's enemies, it is a *præsumptio juris et de jure* that they were lost by negligence, fraud or connivance on his part.—Best, 8th Ed., 381-382. Negligence or carelessness is not a ground of relief from legal liability.

(c). In an action for damages by collision, it appeared that the defendant's vessel while in motion came into collision with the plaintiff's vessel which was at anchor. *Held*, that the fact that the plaintiff's vessel at the time of collision was at anchor, and could be seen was *prima facie* evidence of *negligence* on the part of the defendants—*Clyde Navigation Co. v. Barclay*, 12 P. D. 46 ; 56 L. J. 83.

**Ill-will.**—A certain newspaper called the *Rajya Bhakta* published a false and defamatory statement of the plaintiff. More than a month afterwards, the defendant published an article in their newspaper, the *Jame Jameed*, calling attention to the statement made in the *Rajya Bhakta* and repeating it. The article, however, declared that the said statement was evidently false. It pointed out that the defendants were the first to raise an outcry against it ; that they had expected the plaintiff to take notice of it, but that as he had not done so, they published that intimation to the public. The plaintiff sued the defendants for libel. He complained that the defendants had maliciously repeated and called attention to the libel in their paper for the purpose of giving it a wide circulation, and that their assertion of its untruth was made merely in order to protect themselves. The defendants pleaded that the article in their paper was not defamatory, and denied malice. *Held*, that reading the article as a whole and in its natural sense, and taking it in connection with previous articles appearing in the defendant's paper with reference to the plaintiff, it was in itself defamatory of the plaintiff—*Kaithasru Naoroji Kabraji v. Jehangir B. Murzban*, I. L. R. 14 Bom. 532.

15. When there is a question whether an act was accidental or intentional, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

Facts bearing on question whether act was accidental or intentional.

### *Illustrations.*

(a). A is accused of burning down his house in order to obtain money for which it is insured. The facts that A lived in several houses successively, each of which he insured, in each of which a fire occurred, and after each of which fires A received payment from a different insurance office, are relevant, as tending to show that the fires were not accidental.

(b). A is employed to receive money from the debtors of B. It is A's duty to make entries in a book showing the amounts received by him. He makes an entry showing that on a particular occasion he received less than he really did receive. The question is, whether this false entry was accidental or intentional. The facts that other entries made by A in the same book are false, and that the false entry is in each case in favour of A, are relevant.

(c). A is accused of fraudulently delivering to B a counterfeit rupee. The question is, whether the delivery of the rupee was accidental. The facts that, soon before or soon after the delivery to B, A delivered counterfeit rupees to C, D and E are relevant, as showing that the delivery to B was not accidental.

**Purport.**—This section is merely an application of the rule laid down in sec. 14. The facts contemplated by this section are facts showing system. In each of the cases by which it is illustrated the evidence admitted went to prove the true character of facts which, standing alone, might naturally have been accounted for on the supposition of *accident*. A supposition which was rebutted by the repetition of similar occurrences. In the case of *R. v. Gray*, (4 F. and F. 1102) there were many other circumstances which would have been sufficient to prove the prisoner's guilt, apart from the previous fires. Illustration (a) is a statement of the above case. Illustration (b) is in principle identical with the case of *Reg. v. Richardson*, (2 F. and F. 343), the only difference being that *Reg. v. Richardson* was a case of swelling debits, and the illustration is a case of reducing credits.

The rule laid down in this and the preceding sections is more general than the English law on the subject. The English law excludes evidence of what the prisoner said or did at the time with respect to previous similar occurrences, "for these are collateral facts too remote for any reasonable presumption of guilt to be founded upon them, and such as the prisoner cannot by any possibility be prepared to contradict."—Taylor, sec. 322. But such statements would, I presume, be evidence under sec. 8 and 9 as explaining relevant facts.

*Vide Queen-Empress v. Vajiram*, I. L. R. 16 Bom. 414, cited under sec. 14.

**Accident.**—In *R. v. Voke*, Russ. and Ry. 531, the prisoner was indicted for maliciously shooting at the prosecutor. Evidence was given that the prisoner fired at the prosecutor twice during the day. In the course of the trial it was objected that the prosecutor ought not



to give evidence of two distinct felonies, but Mr. Justice Burrough held that it was admissible; on the ground that the counsel for the prisoner by his cross-examination of the prosecutor had endeavoured to show that the gun might have gone off by accident: and the learned Judge thought the second firing was evidence to show that the first was wilful and to remove the doubt, if any existed, in the minds of the jury.

**Infirmative Hypotheses affecting Real Evidence.**—In speaking of the infirmative hypotheses affecting real evidence, Mr. Best in his valuable work on Evidence at page 187 makes the following observations: "Considered in the abstract, real evidence, apparently indicative of guilt, may be indebted for its criminative shape to *accident, forgery, or the lawful action of the accused*. Here it must not be forgotten that sometimes the most innocent men cannot explain, or give any account whatever of facts which seem to criminate them, and the experience of almost every person will supply him with instances of extraordinary occurrences, the cause of which is to him, at least, completely wrapped in mystery. 1st—Accident. The appearance of blood on the clothes of an accused or suspected person may be explained by his having in the dark, come in contact with a bloody body. Under this head come those cases where the appearance is the result of irresponsible agency; as where the act has been done by a party in a state of somnambulism; or as in the case of the unfortunate person in France, who was executed as a thief, on the strength of a number of articles of missing silver having been found in a place to which he alone had access, and which were afterwards discovered to have been deposited there by a magpie."

16. When there is a question whether a particular act was done, the existence of  
Existence of  
course of business  
when relevant. any course of business, according to  
 which it naturally would have been  
 done, is a relevant fact.

### *Illustrations.*

(a). The question is, whether a particular letter was despatched. The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that that particular letter was put in that place, are relevant.

(b). The question is, whether a particular letter reached A. The facts that it was posted in due course, and was not returned through the Dead Letter Office, are relevant.

"This section proceeds upon the well-recognized fact that the conduct of human beings is generally, and in official and commercial matters, to a very great extent indeed, uniform. The books of a well ordered firm, for instance, are kept from year to year in so unvarying a manner, that there is the strongest presumption that the regularity will not, in any particular instance, be departed from. Some great departments, such as the Post Office, work with such mechanical exactness that uniformity may be regarded as next door to certain. The existence of such a course of business should be clearly made out."—Cung. Evidence Act, 124.

**Letters.**—(a). The press copy of a letter to prove the allotment of shares in a liquidating company is inadmissible in evidence, there being nothing to show that the original letter was properly addressed or posted—*Ramdas Chuckerbutti v. The Official Liquidator, Cotton Ginning Co., Ltd.*, I. L. R. 9 All. 366.

(b). The post-mark on a letter renders the letter admissible in evidence and is *prima facie* evidence that the letter was in the post at the time and place therein specified—*Anderson v. Weston*, 6 Bin. N. C. 296 ; *Polery v. Glosop*, 2 Ex. 191.

(c). Mr. Taylor says : "If letters or notices properly directed to a gentleman be left with his servant, it is only reasonable to presume *prima facie*, that they reached his hands. The fact too of sending a letter to the Post Office will in general be regarded by a jury presumptively proved, if it be shown to have been handed to or left with the clerk whose duty it was in the ordinary course of business to carry letters to the post and if he can declare that, although he has no recollection of the particular letter, he invariably took to the Post Office all letters that either were delivered to him, or were deposited in a certain place for that purpose." Sec. 148.

(d). If a person refuses a registered letter sent by post, he cannot afterwards plead ignorance of its contents—*Luft Ali Miah v. Peari Mohan Rai*, 16 W. R. 223.

(e). Where a notice to quit was sent by a registered letter, the posting of which was proved, and which was produced in Court in the cover in which it was despatched, that cover containing the notice with an endorsement upon it purporting to be by an officer of the Post Office stating the refusal of the addressee to receive the letter. *Held*, that this was sufficient service of notice—*Jogendra Chundra Ghose v. Dwarka Nath Karmokar*, I. L. R. 15 Cal. 681 ; *Luft Ali Miah v. Peari Mohan Rai*, 16 W. R. 223 and *Papillon v. Brunton*, 5 H. and N. 518, referred to.

*Admissions.*

17. An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

Admission defined.

**Rule regarding Admission.**—The definition of admission is intended to exclude admissions by pleadings, admissions which, if so pleaded, amount to estoppels, and admissions made for the purpose of a cause by the parties or their solicitors.—Stephen's Digest, 165. The general rule with regard to admissions, which are defined to mean all that the parties or their representatives in certain degrees say about the matter in dispute, or facts relevant thereto, is that they may be proved against those who made them, but not in their favour.—Stephen's Evidence Act, 126.

**Distinction between Admission and Confession.**—The English Law of Evidence makes a distinction between *admission* and *confession*. The term admission is usually applied to *civil transactions*, and to those matters of fact, in criminal cases, which do not involve criminal intent; the term confession being generally restricted to *acknowledgments of guilt*.

**Application of secs. 17—22.**—The provisions of secs. 17—22 are applicable to criminal as well as civil cases. In criminal cases, admissions procured by inducement, threat or promise are not admissible, but it seems that admissions thus obtained, in the absence of illegal duress, are admissible in civil suits.

**Best on Admission.**—Mr. Best says: "The present (chapter) will be devoted to that species of evidence for or against a party which is afforded by the language or demeanour of himself, or of those whom he represents, or of those who represent him. All such evidence we purpose to designate by the expression 'self-regarding.' When in favour of the party supplying it, the evidence may be said to be 'self-serving,' when otherwise, 'self-harming.'"

"The rule of law with respect to self-regarding evidence, is that when in the *self-serving* form it is not in general receivable; but that in the *self-harming* form it is, with few exceptions, receivable, and is usually considered proof of a very satisfactory kind. For, although, when viewed independently of jurisprudence, it would be difficult to maintain that the declarations, or what is equivalent to

the declarations of one man, may not in particular cases have some probative force as evidence against another, still our law rejects them in obedience to its great principle, which requires judicial evidence to be proximate; and also from the peculiar temptations to fraud and fabrication, which the allowing such evidence would so obviously supply. This is a branch of the general rule that a man shall not be allowed to make evidence for himself. But, on the other hand, the universal experience of mankind testifies that, as men consult their own interest, and seek their own advantage, whatever they say or admit against their interest or advantage may, with tolerable safety, be taken to be true as against them, at least until the contrary appears." Self-harming statements are either 'judicial' or 'extra-judicial'—*in judicio* or *extra judicium*, according as they are made in the course of a judicial proceeding, or under any other circumstances. In civil cases they are usually called "admissions" and in criminal cases "confessions."

**The whole statement containing the admission—**

For though some part of it may be favourable to the party, and the object is only to ascertain what he has conceded against himself, and what may therefore be presumed to be true, yet, unless the whole is received, the true meaning of the part, which is evidence against him, cannot be ascertained. When an admission is contained in a document, or series of documents, or when it forms part of a discourse or conversation, it is desirable that the whole document or discourse be proved, though the Judge or the jury need not give equal credit to every part of it. But see sec. 39, *post*.

(a). Where a person uses the admission of another as evidence, the whole admission must be put in. He cannot put in half and exclude the other half. But those who have to decide upon the evidence, are not bound to believe the whole of the statement—*Nilmoney Singh Deo v. Ramanoograha Rai*, 7 W. R. 29. See also *Sultan Ali v. Chand Bibi*, 9 W. R. 130; *Goloke Chundra Chowdhary v. Magistrate of Chittagong*, 25 W. R. (Cr.) 15.

(b). An unfair use is not to be made of a man's written statement by trying to convert into an admission by him that which he never intended to be an admission. If a party makes a qualified statement, that statement cannot be used against him apart from the qualification—*Bycantanath Coomar v. Chundra Mohan Chowdhary*, 10 W. R. 190. See also *Pulin Behary Sen v. Watson & Co.*, 9 W. R. (F. B.) 190; *Jadunath Ray v. Barodakant Ray*, 22 W. R. 220.

(c). A plaintiff abandoning his own case and falling back on the admission of the defendant is bound to take the admission as it

stands and in its entirety—*Tarini Prosoud Sen v. Dwarkanath Rakhit*, 15 W. R. 451.

**Evidence of Admissions.**—This may be supplied by *words, writing, signs or silence*. So far as its admissibility is concerned, it is, in general, immaterial to *whom* an admission is made. But if coming under the head of what the law recognises as confidential communication, it will not be received in evidence; neither will it, if embodied in a communication made ‘without prejudice,’ the object of such being to buy peace, and settle disputes by compromise instead of by legal proceedings.

(a). Affidavits sworn to by a party in former legal proceedings, answers filed by him in Chancery in a former suit, evidence given by him in an action-at-law, or his examination taken before Commissioners of bankruptcy, will be evidence against himself in a subsequent cause, and this too, though his subsequent opponent was a stranger to the prior proceedings.

(b). A statement made by the defendant in another suit may be used as an admission—*Harish Chundra Mullick v. Prosunno Oumar Banerji*, 22 W. R. 303. See also *Lala Jugdeo Sahoy v. Digambar Ray*, 22 W. R. 304 (Note); *Kasi Kishore Rai Chowdhary v. Bama Sundari Debi Chowdhraia*, 23 W. R. 27; *Bhugwan Chundra Dutt v. Mecholol Chuckerbutty*, 17 W. R. 372; *Pogha Maton v. Guru Babu Goneshram*, 24 W. R. 114.

(c). Admissions made in former arbitration proceedings may be used against the parties making them, in a subsequent suit—*Haranath Sarkar v. Preonath Sarkar*, 7 W. R. 249.

(d). An admission made by a *jagirdar* in a suit brought by Government to assess the lands, that the lands were comprised in a zamindari, is evidence of that fact in a suit by the zaminder to resume those lands—*Forbes v. Mir Mahamad Taki*, 14 W. R. (P. C.) 28.

(e). A deposition of a person in a suit to which he was not a party, is in a subsequent suit in which he is a defendant admissible as admission, though he be alive and not called as a witness—*Sujan Bibi v. Ackmat Ali*, 21 W. R. 414. But see *Kassi Moradin v. Monye Mondal*, 16 W. R. 220.

(f). Account books, though proved not to have been regularly kept, in course of business, but proved to have been kept on behalf of a firm of contractors by the servant or agent appointed for that purpose, are clearly relevant as admissions against the firm under this section and secs. 18 and 21—*Reg. v. Hanumanta*, I. L. R. 1 Bom. 610.

(g). The defendants relied upon a horoscope of the plaintiff which had been a public record from a period *anti litem motem*, and put it in as an admission under this section and sec. 18. *Held*, that it was admissible—*Raja Govendan v. Raja Govendan and others*, I. L. R. 17 Mad. 134. *Ramnarain Khallia v. Moni Bibi*, I. L. R. 9 Cal. 613 and *Satis Chundra Mukerji v. Mahendra Lal Patack*, I. L. R. 17 Cal. 849, distinguished.

(h). A letter containing an admission is admissible in evidence, even if unstamped—*Sital Persaud v. Monohar Das*, 23 W. R. 325.

(i). An entry showing the extent of the holding and the amount of rent, made in a book belonging to the lessor and signed by the lessee, is relevant as an admission—*Narain Kumari v. Ramkrishna Das*, I. L. R. 5 Cal. 864.

**Infirmity of evidence of oral Admissions.**—Evidence of oral admissions ought always to be received with great caution. Its imperfections are many. The person making the admission may have been misinformed, or he may not have clearly expressed his meaning, or the witness deposing to such admission may have misunderstood him, or may purposely misquote the expressions used. It also sometimes happens that the witness by unintentionally altering a few words, or omitting a few words, will give an effect to the statement completely at variance with what the party actually said. It is a very dangerous thing to rest a judgment upon verbal admission only, without very clear evidence, specially when there are other means of proving the case, if a true one. But when an admission is deliberately made and precisely identified, the evidence it affords is often of the most satisfactory character and a party is held to his admission, unless it clearly appears that it was made through mistake.

**Infirmative Circumstances.**—The party, whose admission is offered in evidence, may prove the following facts in order to minimize the effect of such admission. 1st—That his mind was not in its natural state, at the time he made the admission. 2nd—That he made the admission under a mistake of fact. 3rd—That the admission contains matters stated on mere hearsay.

18. Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorized by him to make them, are admissions.

Admission—by party to proceeding or his agent ;

Statements made by parties to suits, suing or  
by suitor in re-  
 presentative  
 character ; sued in a representative character,  
 are not admissions, unless they were  
 made while the party making them held that  
 character.

Statements made by—

(1) persons who have any proprietary or pecuniary  
by party inter-  
 ested in subject-  
 matter ; by per-  
 son from whom  
 interest derived. interest in the subject-matter of the  
 proceeding, and who make the state-  
 ment in their character of persons  
 so interested, or

(2) persons from whom the parties to the suit  
 have derived their interest in the subject-matter  
 of the suit, are admissions, if they are made during  
 the continuance of the interest of the persons  
 making the statements.

*Vide* note to sec. 17.

**Admissible statements.**—Statements suggesting the existence or  
 non-existence of a fact in issue or a fact relevant thereto, if made  
 by a substantial party to the record or by one identified with such  
 party in legal interest and during the continuance of such interest,  
 are admissible against the person by whom or on whose account such  
 statements are made.

**Admissions by parties to the proceeding.**—A statement made  
 by a party to a proceeding may be an admission whenever it is made,  
 unless it is made by a person suing or sued in a representative  
 character only, in which case (it seems) it must be made whilst the  
 person making it sustains that character.—Stephen's Digest, art. 16.  
 In holding that the admissions of parties to the record are receivable  
 in evidence, it matters not whether such admissions were made before  
 or after the party had arrived at full age. The English Common  
 Law recognises no distinction between *nominal* and *real* parties.  
 In our country, where the system of *benami* transaction prevails,  
 no distinction between nominal and real parties should be made,  
 and the real party ought to be held bound by an admission made by  
 his *benamidar*, the nominal party.

**Admissions by infants.**—So far as the validity of admission itself is concerned, it matters not whether the person who made it was, at the time of making it, of full age. Accordingly, in an action against a person for goods supplied to him during his minority, admissions by him while a minor may be used. The weight to be attached to such admissions will depend very much upon the intelligence of the minor making the admissions and the influence he was under at the time of making it.

The declarations and acts of an agent cannot bind an infant, because an infant cannot legally constitute an agent.

**Agent.**—The word *agent* has not been defined in the Act. For the definition of the word, see the Contract Act.

The subject of the relevancy of admissions by agents is rendered difficult by the vast variety of forms which agency assumes, and by the distinction between an agent for the purpose of making a statement and an agent for the purpose of transacting business. If A sends message by B, B's words in delivering it are in effect A's; but B's statements in relation to the subject-matter of the message have, as such, no special value. A's own statements are valuable if they suggest an inference which he afterwards contests because they are against his interest; but when the agent's duty is done, he has no special interest in the matter.—Stephen's Digest, 166.

Mr. Story in his work on Agency remarks: "The representation, declaration or admission of the agent does not bind the principal, if it is not made at the very time of the contract, but upon another occasion, or if it does not concern the subject-matter, in no degree belonging to the *res gestæ*." Sec. 135.

An agent may undoubtedly, when engaged in the business of his principal and acting within the scope of his actual or ostensible authority, bind his principal, by his agreement, and in many cases by his acts. What the agent has said may be what constitutes the agreement of the principal, or the representations or statements made may be the foundation of, or the inducement to, the agreement. But the admission of an agent is not of the same effect as the admission of the principal. A party is bound by his own admission, and is not permitted to contradict it. But it is impossible to say a man is precluded from questioning or contradicting anything any person has asserted as to him, as to his conduct or his agreement, merely because that person has been an agent of his. See the remarks of Sir W. Grant in *Fairlie v. Hastings*, 10 Ve. 126-7.

The declaration of the agent is not proof of his agency. Agency is to be distinctly proved.



(a). A report made by an agent to a principal is not an admission which can be proved by a third person—*Re Derala Company*, L. R. 22 Ch. Div. 593.

(b). If A admits that he made a purchase as agent for B, this admission is evidence against A's heirs and against C who claims through them, to show that the purchase was made by A, as agent and not on his own account—*Garibullah Sirkar v. Mr. G. D. Boyd and others*, 2 W. R. 190.

(c). The declarations of the agent bind the principal only so far as the agent had authority to make them.—Taylor, sec. 540.

(d). What is said by an agent respecting a contract or other matter in the course of his employment is an admission as against the principal, in a suit grounded on such contract or matter; but what is said by him on another occasion is not an admission—*Peto v. Hague*, 5 Esp. 134.

**Admissions by Attorneys, Vakils and Counsel.**—"Barristers and Solicitors are the agents of their clients for the purpose of making admissions whilst engaged in the actual management of the cause, either in Court or in correspondence relating thereto; but statements made by a Barrister or Solicitor on other occasions are not admissions merely because they would be admissions if made by the client himself."—Stephens's Digest, art. 17.

(a). The admissions of *Attorneys of record* bind their clients in all matters relating to the progress and trial of the cause. Admissions, however, contained in the *mere conversation* of an Attorney, cannot be received against a client, though they relate to the facts in controversy.

(b). A Counsel, unless his authority to act for his client is revoked, and such revocation is notified to the opposite side, has, by virtue of his retainer and without need of further authority, full power to compromise a case on behalf of his client; and the Court will not disturb a compromise so entered into, unless it appears that it was entered into under a mistake and that some palpable injustice has been thereby caused to the client—*Jang Bahadur Singh v. Shankar Rai*, I. L. R. 13 All. (F. B.) 272. In this case, the learned Chief Justice drew a distinction between the authority of Counsel and that of Vakils. He said: "When the authority of Vakils to bind their clients is called in question, that authority must depend entirely on the terms of the particular Vakalatnama. For my part, I should read a Vakalatnama widely and liberally, unless it appears that the client intended to limit the authority of his Vakil."

(c). A distinct admission of liability made by a Vakil, who represented the defendant, and whose authority was not questioned, was held to be sufficient to warrant a decree in favour of the plaintiff—*Srematy Dassi v. Petambur Panda*, 21 W. R. 332.

(d). A statement made in a case by a pleader on behalf of his client after full consideration and consultation is admissible as evidence against that client in another case in which he is a party—*Oomabutti v. Parashunath Panday*, 15 W. R. 135.

(e). The admission of a defendant's Vakil in Court was held to be legal evidence of the receipt of money and to do away with the necessity for other proof—*Kalikanund Bhattacharji v. Giribala Dabi*, 10 W. R. 322.

(f). A party is bound by the admission of his duly constituted Vakil, where the admission is one of a fact which, but for such admission, the opposite party would have had an opportunity of proving—*Kowar Naryan Rai v. Srinath Mitter*, 9 W. R. 485. See also *Khajah Abdool Gunni v. Gourmoni Debia*, 9 W. R. 375; *Rajendra Naryan Rai v. Bejoy Govind Singh*, 2 Moo. I. A. 253.

(g). A Vakil has no authority, under an ordinary Vakalatnama, to give up a portion of the claim already decreed, and any such abandonment will not be binding on his client—*Sheikh Abdul Sabhan Chowdhary v. Shibkristo Daw*, 3 B. L. R. App. 15.

(h). It is not within the ordinary scope of a pleader's duties to relinquish any portion of his client's case without express authority from the client, who is not bound by such relinquishment unless it was authorized by himself—*Gour Prosad Dass v. Sukdebti Dass*, 12 W. R. 278. See also *Chundra Kumar Deo v. Merza Sudakat Mahomed Khan*, 18 W. R. 436.

(i). Where a Vakil upon a mistaken view of the law goes beyond and contravenes his instructions, his erroneous consent cannot bind his client—*Ramkant Chowdhary v. Brindaban Chunder Dass*, 16 W. R. 246.

(j). The greatest caution should be exercised by the Courts before acting upon statements out of the ordinary scope of the Vakil's authority in particular matter in which he was employed—*Venkatarammanna v. Chavela Atchiyamma*, 6 M. H. C. Rep. 127.

**Admissions by co-defendants.**—(a). The answer of one defendant cannot be read in evidence against his co-defendant; the reason being, that, as there is no issue between them, no opportunity can have been afforded for cross-examination; and, moreover, if such a course were allowed, the plaintiff might make one of his friends

a defendant, and thus gain a most unfair advantage. But this rule does not apply to cases where the other defendant claims through the party whose answer is offered in evidence; nor to cases where they have a joint-interest, either as partners or otherwise, in the transaction. *Vide* Taylor, sec. 684.

(b). A statement of defence made by one defendant ought not to be read in evidence either for or against his co-defendant, nor the answer to interrogatories of one defendant except as against himself—*Amirtalol Boss v. Rajani Kant Mitter*, 23 W. R. (P. C.) 214. See also *Lachman Singh v. Tansukh*, I. L. R. 6 All. 395; *Asizullah Khan v. Ahamadali Khan*, I. L. R. 7 All. 353; *Niamatoollah Khadim v. Himmatali Khadim*, 22 W. R. 519.

(c). A suit for rent having been brought against two persons as joint-tenants, and a decree passed therein in favour of the plaintiff but for a less amount than that claimed by him, an appeal was preferred by the defendants, but subsequently, pending the hearing of the appeal, one of them filed a petition admitting the correctness of the amount claimed by the plaintiff and stating his willingness to pay half of such amount. *Held*, that the admission of the one defendant did not bind the other; and that, notwithstanding such admission, the suit having been brought against the defendants as joint-tenants, a separate decree for half of the amount admitted could not be made against the defendant who made the admission—*Chunderesukur Narain Persaud v. Chuni Akir and another*, 9 C. L. R. 359.

**Admissions by guardians.**—(a). The guardian of a minor has no authority to bind his ward by admissions of previous transactions—*Surja Mukhi Kowar v. Bhagwati Kunwar*, 10 C. L. R. 377 (P. C.)

(b). A father is not, by virtue of his relationship, the agent of his infant son—*Haney v. Donnelly*, 12 Gray, 361.

**Admissions by partners.**—Partners are agents for each other. An admission made by a partner during the continuance of the partnership and within the scope of its objects, is admissible against his co-partners. But no admission of a partner, made after the dissolution of partnership, can be received in evidence even if such admission be in regard to acts done during the existence of such partnership.

**Admissions by wife.**—An admission made by the wife will turn on the degree in which the husband permitted her to participate, either in the transaction of his affairs in general, or in the particular matter in question.—Taylor, 770. It does not, however, follow that

because a wife has authority to make admission as to one matter, that she is authorized to make admissions as to another.

**Representative character.**—The following are instances of persons holding a representative character. 1. The assignee of a bankrupt. 2. An executor. 3. An administrator. 4. A manager holding a certificate under Act XL of 1858.

(a). A purchaser at an execution-sale is the *representative* of the judgment-debtor; and his position is no better than that of claimants under any other conveyance or assignment—*Rajah Enayet Hossein v. Girdharee Lal*, 2 B. L. R. (P. C.) 75.

**Admission by party interested in subject-matter.**—"The admissions of one person are also evidence against another, in respect of privity between them. The term privity denotes mutual or successive relationship to the same rights of property; and privies are distributed in several classes, according to the manner of this relationship. Thus there are privies in estate—as, donor or donee, lessor and lessee, joint-tenants, and successive bishops, rectors, and vicars; privies in blood—as, heir and ancestor, and co-parceners; privies in representation—as, executors and testators, administrators and intestates; privies in law—where the law, without privity of blood or estate, takes the land from one and bestows it upon another, as by escheat. All these are more generally classed into privies in estate, privies in blood, and privies in law. The ground, upon which admissions bind those in privity with the party making them, is, that they are identified in interest; and of course the rule extends no further than this identity."—Taylor, sec. 712.

(a). Where several persons are jointly interested in the subject-matter of the suit, the general rule is that the admissions of any one of those persons are receivable against himself and fellows, whether they be all jointly suing or sued, provided the admission relates to the subject-matter in dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered. The principal of this rule is that for the purpose of making these statements with reference to the joint concern or common subject of interest, one partner or co-contractor is considered to be the agent of the others. Consequently, where there are several co-contractors, or persons engaged in one common business or dealing, a statement made by one of them with reference to any transaction which forms part of their joint-business, has always been held admissible as evidence against the others. *Vide* the remarks of Sir R. Couch, C. J., in *Kawsalliah Sundari Dasi v. Mukta Sundari Dassi*, 1. L. R. 11 Cal. 588. The facts of the case were as

follows: In a suit between a zaminder and his ijardars for rent, a person who was one of several jotedars in the mehal, was called as a witness for the zaminder, and admitted the fact that an arrangement existed whereby he and his co-jotedars had agreed to pay rent to the zaminder direct; this suit was decided in favour of the zaminder. The ijardars then brought a suit against the jotedars, amongst whom was the witness above-mentioned, to recover the sum which the jotedars ought to have paid to the zaminder direct, and which the ijardars had been decreed to pay. The jotedars disclaimed all liability to pay rent to the ijardars; in this suit the evidence given by the jotedar in the zaminder's suit was received as evidence on behalf of the plaintiffs against all the defendants.

(b). Admissions affect a substantial party to the record, in the absence of fraud, if made by a person jointly interested with the said party, specially when such party has a substantial interest in the result of the proceeding at the time such admissions are made. Statements made by the real owners in *benami* transactions are instances of such admissions.

**Derived their interest.**—It is not sufficient that the interest be subsequent in point of time. It must have been *derived* from the person who made the statement sought to be used as an admission.—Field, Evi. 129.

**Instances of statements admissible in evidence being made by persons from whom interest is derived, &c.—**

1st.—Statements relating to the subject of grant, made by a grantor or donor, are admissible as admissions against the grantee or donee; but no admission by a grantor or donor made after conveyance binds his grantee or donee.

2nd.—Statements made by a former holder of an office are admissions against his successors in it.

3rd.—Statement of the ancestor is admission against the heir, when the statement relates to matters of succession.

4th.—Statement of a testator is admission against his executor.

5th.—Statement of an intestate is admission against the administrator of his estate.

6th.—Statement made by a landlord in a prior lease which concerns the estate is evidence against a lessee, who claims by a subsequent title.

**Continuance of the interest.**—No statement is evidence under this section, if it is made by persons herein enumerated after his interest in the subject-matter of the suit has ceased, "because,"

says Mr. Taylor, "it is manifestly unjust, that a person, who has parted with his interest in property, should be empowered to divest the right of another claiming under him, by any statement that he may choose to make. Thus, the admission of a former party to a bill of exchange, made after he has negotiated it, cannot, under any circumstances, be received against the holder; and where a person had, by a voluntary post-nuptial settlement, conveyed away his interest in an estate, and afterwards had executed a mortgage of the same property, it was held, that his admission that money had actually been advanced upon the mortgage could not be received on behalf of the mortgagee, who was seeking to set aside the former settlement as voluntary and void. So, also, the declaration of a bankrupt, though good evidence to charge his estate with a debt, if made before his bankruptcy, is not admissible at all, if it were made afterwards. This most just and equitable doctrine will be found to apply to the cases of vendor and vendee, grantor or grantee, and generally to all cases of rights acquired in good faith previous to the time of making the admission in question."—Taylor, sec. 794.

See *Khemankari Chowdhraïn v. Gour Chundra Mazumdar*, 5 W. R. 268.

**Time and circumstances of the admission.**—With respect to the time and circumstances of the admission, it may be observed, that, whenever the declarations of a third person are offered in evidence, on the ground that the party, against whom they are tendered, derives his title from the declarant, it must be shown that they were made at a time when he had an interest in the property in question.

**19. Statements made by persons whose position or liability it is necessary to prove as against any party to the suit, are admissions, if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies such position or is subject to such liability.**

Admissions by persons whose position must be proved as against party to suit.

### *Illustration.*

A undertakes to collect rents for B. B sues A for not collecting rent due from C to B. A denies that rent was due from C to B.

A statement by C that he owed B rent is an admission, and is a relevant fact as against A, if A denies that C did owe rent to B.

This section seems to refer to admissions by strangers. Such admissions are, as a rule, not relevant as against the parties except in certain exceptional cases. The exceptions mentioned in this section "arise when the issue is substantially upon the mutual rights of such persons at a particular time; in which cases the practice is to let in such evidence in general, as would be legally admissible in an action between the parties themselves."

(a). The admissions of a person whose position in relation to property in suit it is necessary to prove against another, are in the nature of original evidence and not hearsay, though such person is alive and has not been cited as a witness—*Ali Moidin Raveethan v. Elaya Chanidathil Kombiachen*, I. L. R. 5 Mad. 239.

(b). In actions against Sheriffs for not executing process against debtors, statements of the debtor admitting his debt to be due to the execution-creditor, are deemed to be relevant as against the Sheriff—*Kempland v. Macaulay*, Peake, 95.

(c). In actions by the trustees of bankrupts an admission by the bankrupt of the petitioning creditor's debt is deemed to be relevant as against the defendant—*Jarett v. Leonard*, 2 M. and S. 265.

(d). Where A guaranteed the payment for such goods as the plaintiffs should send or deliver to C in the way of trade, a statement by the principal debtor C, that he had received goods, would be an admission against the surety A, in as much as it would be relevant in a suit brought against C.

20. Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions.

Admissions by persons expressly referred to by party to suit.

### Illustration.

The question is, whether a horse sold by A to B is sound. A says to B—'Go and ask C, C knows all about it.' C's statement is an admission.

The provision of this section comes very near to the case of arbitration. For a full understanding of this section refer to the provisions of sec. 31.

Mr. Taylor says : " The admissions of a third person are also receivable in evidence against the party who has *expressly referred another to him* for information in regard to an uncertain or disputed matter. In such cases the party is bound by the declarations of the person referred to, in the same manner, and to the same extent, as if they were made by himself. In the application of this principle, it matters not whether the question referred be one of law or of fact ; whether the person to whom reference is made, have or have not any peculiar knowledge on the subject ; or whether the statements of the referee be adduced in evidence in an action on contract, or in an action for tort." *Vide* secs. 689 and 690.

The reference herein mentioned must be an *express reference for information* in order for the statement to become an admission. Mr. Taylor holds an opposite view. He says that : " To render the declarations of a person referred to, equivalent to a party's own admission, it is not necessary that the reference should have been made by express words ; but it will suffice if the party by his conduct has tacitly evinced an intention to rely on the statements as correct."

(a). Where two parties had agreed to abide by the opinion of Counsel upon the construction of a statute, the party against whose interest the opinion operated was held bound thereby in a subsequent action—*Price v. Hollis*, 1 M. and Sel. 105. See also *Downs v. Cooper*, 2 Q. B. 256.

(b). Where a party asks others to verify his signature to a petition or to identify him as one of the petitioners, it amounts to an allegation on his part that he made the statements which appear in the petition, and is as effective evidence against the party making the request as if the petition were in fact filed—*Mohan Sahoo and others v. Chato Mowar*, 21 W. R. 34

(c). In an action for goods sold and delivered, where the fact of the delivery of them by the carman was disputed, and the defendant said, " If he will say that he delivered the goods, I will pay for them" ; he was held bound by the affirmative reply of the carman—*Daniel v. Pitt*, Pea Add. Cas. 238. Also refer to *Turner v. Yates*, 16 How. 14 ; *Chapman v. Twitchell*, 37 Mc. 59, 61 ; *Chadsey v. Greene*, 24 Conn. 562 ; *Over v. Schifting*, 102 Ind. 191.

## 21. Admissions are relevant and may be proved

Proof of admissions against persons making them, and by or on their behalf.

as against the person who makes them, or his representative in interest ; but they cannot be proved by or on behalf of the person who



makes them or by his representative in interest, except in the following cases :—

(1). An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section thirty-two.

(2). An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.

(3). An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission.

### *Illustrations.*

(a). The question between A and B is, whether a certain deed is or is not forged. A affirms that it is genuine, B that it is forged. A may prove a statement by B that the deed is genuine, and B may prove a statement by A that the deed is forged ; but A cannot prove a statement by himself that the deed is genuine, nor can B prove a statement by himself that the deed is forged.

(b). A, the Captain of a ship, is tried for casting her away. Evidence is given to show that the ship was taken out of her proper course. A produces a book kept by him in the ordinary course of his business, showing observations alleged to have been taken by him from day to day, and indicating that the ship was not taken out of her proper course. A may prove these statements, because they would be admissible between third parties, if he were dead, under section thirty-two, clause (2).

(c). A is accused of a crime committed by him at Calcutta. He produces a letter written by himself and dated at Lahore on

that day, and bearing the Lahore post-mark of that day. The statement in the date of the letter is admissible, because, if A were dead, it would be admissible, under section thirty-two, clause (2).

(d). A is accused of receiving stolen goods knowing them to be stolen. He offers to prove that he refused to sell them below their value. A may prove these statements, though they are admissions, because they are explanatory of conduct influenced by facts in issue.

(e). A is accused of fraudulently having in his possession counterfeit-coin which he knew to be counterfeit. He offers to prove that he asked a skilful person to examine the coin, as he doubted whether it was counterfeit or not, and that that person did examine it and told him it was genuine. A may prove these facts for the reasons stated in the last preceding illustration.

*Vide* notes to secs. 17 and 32.

**Explanation.**—This section lays down the salutary provision that statements made by a person can only be proved by or on behalf of his antagonist. Consequently such statements only will be let in, which make against his cause and favor that of his antagonist. Statements made by a party favorable to his own case can only be admitted under particular circumstances which make such statements deserving of special credit. Such statements are mentioned in sec. 32.

Illustrations (d) and (e) are instances of admissions which a party making them may prove on his own behalf, they being admissible under other provisions of the Code.

**Representative in interest.**—(A). **Purchaser at a public sale.**—

(a). A purchaser in execution of a decree of a Civil or Revenue Court is not bound by any admission made by his execution-debtor, as he comes in as a stranger by an act in law—*Rungo Moni Dabi v. Raj Coomari Bibi*, 6 W. R. 197.

(b). The plaintiff, as purchaser of the rights of Government in the taluk, is not privy in estate to the defaulting proprietor. He does not derive his title from him, and is bound neither by his acts nor by his laches—*Moonshi Buzlol Rahaman v. Pran Dhan Dutt*, 8 W. R. 222. The principle laid down in this case has been followed in *Radha Govind Koer v. Rakhal Das Mukerji*, I. L. R. 12 Cal. 82.

(c). The purchaser at a sale by auction in execution of a decree is not in the position of a person who takes a conveyance direct from the party, and is not therefore bound by a statement made by the

judgment-debtor on some previous occasion in a mortgage to which the auction-purchaser was himself a party. The admission, so far as it can be considered as his, may at the utmost be used only as evidence against him—*Musamut Imrit Keer and another v. Lalla Dabi Prasad Singh and others*, 18 W. R. 200.

(d). The simple fact of purchase at an execution-sale will not make the purchaser the representative of the judgment-debtor, as he derives his title by operation of law adversely to the judgment-debtor—*Lala Parbhu Lal v. Mylne*, I. L. R. 14 Cal. 401.

(e). In the case of *Gour Sunder Lahiri v. Hem Chunder Chowdhry*, I. L. R. 16 Cal. 355, it was held that the plaintiff A, being the purchaser at a public sale in execution of a decree, was not the representative of the judgment-debtors, the mortgagors, within the meaning of sec. 244 of the Civil Procedure Code.

(f). Under a sale in execution of a decree, the purchaser, notwithstanding he acquires merely the right, title, and interest of the judgment-debtor, acquires that title by operation of law adversely to the judgment-debtor, and freed from all alienations or encumbrances effected by him subsequently to the attachment of the property sold in execution. *Vide* remarks of their Lordships of the Privy Council in *Donendranath Sanyal v. Ramkumar Ghose*, 10 C. L. R. 281. See also *Anand Mayi Dasi v. Dharendra Chandra Mukerji*, 8 B. L. R. 123 (P. C.)

(g). E, being in possession of the documents of title, mortgaged land to the plaintiff. E and his father A borrowed money from one R, who obtained a decree against A, and purchased the bond at the execution-sale. In a suit for foreclosure of the plaintiffs mortgage against E and R, the lower Courts held that A was the true owner but the lower Appellate Court did not decide whether the plaintiffs mortgage was a valid transaction. *Held*, on second appeal, that R acquired the property adversely to A, and not as his representative—*Banshi Chunder Sen v. Enayet Ali*, I. L. R. 20 Cal. 236.

**Rulings apparently holding an opposite view—**

(A). The purchaser at a sale in execution of a decree was held to be “representative in interest” of the judgment-debtor within the meaning of this section—*Unnopoorna Dassi v. Nafur Poddar*, 21 W. R. 148.

(i). In *Enayet Hossein v. Girdharee Lal*, 11 W. R. (P. C.) 29, their Lordships of the Privy Council made the following observations: “There is another point which appears to have been taken by the learned Judges of the High Court, and which seems to have been founded on the supposition that there was some distinction.

to be made in favor of a person claiming under an execution-sale as contra-distinguished from the representatives of any person claiming under an ordinary assignment or conveyance. In the opinion of their Lordships, there is no foundation in principle or authority for any such distinction."

(j). A purchase by a mortgagee, at a sale in execution of a decree upon his mortgage, of the right, title, and interest of the mortgagor, who has been estopped from asserting a title to the property as against certain parties, does not place such mortgagee in a better position as regards the estoppel—*Poreshnath Mukerji and others v. Anathnath Deb*, I. L. R. 9 Cal. 265.

(k). When the Court sells the right, title, and interest of a judgment-debtor in property, it cannot be regarded as selling more than the judgment-debtor himself could honestly sell—*Sobhagchand Golabchand v. Bhaichand*, I. L. R. 6 Bom. 193 (F. B.) See also *Baduji Balal v. Satyabhama Bai*, I. L. R. 6 Bom. 490.

(B). **Purchaser at a private sale.**—(a). Under a private sale, the purchaser derives title through the vendor and cannot acquire a better title than that of the vendor—*Donendranath Sanyal v. Ram Kumar Ghose*, 10 C. L. R. 281; see *Gour Sundar Lahiri v. Hem Chunder Chowdhry*, I. L. R. 16 Cal. 355; *Lala Parbhu Lal v. Mylne*, I. L. R. 14 Cal. 401.

**Clause 1.**—In a suit to establish the existence of a family-custom, the plaintiffs offered in evidence a deed containing a recital that the custom of the family was as alleged in the plaint, and a covenant to do nothing contrary to it. The deed was executed before action brought by the present plaintiffs, and also by a plaintiff who had died since the institution of the suit, and, as the plaint alleged, by "a considerable majority" of the family, but the defendant was not a party to it. *Held*, that the deed was admissible as evidence on behalf of the plaintiffs, though they could themselves be called as witnesses; but that, though admissible, the custom as against the defendant must be proved *aliunde*—*Hurronath Mullik v. Nittanund Mullik*, 10 B. L. R. 263.

**Clause 2.**—As to state of mind or body, see sec. 14 of the Code.

**Clause 3.**—With reference to this clause, an admission may be provable on behalf of the person making it by being relevant (otherwise than as an admission) under sec. 6 or some one of the sections following it.

22. Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness of a document produced is in question.

When oral admissions as to contents of documents are relevant.

**Explanation.**—This is a salutary provision. The importance of compelling people to procure the best evidence they can, and the importance of excluding opportunities of fraud and dishonesty, are considerations which justify the rule excluding oral admissions as to the contents of a document. But this section will not exclude admissions which the parties agree to make at the trial (*vide* sec. 58); nor will it exclude written admissions as to such matters. *Vide* sec. 65 (b).

(a). A written contract can only be proved by the writing itself, and if the document is inadmissible for want of registration, no secondary evidence of the contract can be received.

(b). The plaintiff sued for a sum said to be due upon a settlement of accounts, and, instead of producing and proving the account current between himself and the defendant, produced evidence to prove the admission of the debt. Their Lordships of the Privy Council affirmed the judgment of dismissal saying: "They consider that it is a very dangerous thing to rest a judgment upon verbal admissions of a sum due, without very clear evidence, especially when there are other means of proving the case, if a true one"—*Sheopersaud v. Juggernath*, 13 C. L. R. 271.

(c). A party's admission as to the contents of a document not made in the pleadings, but in a deposition, is secondary evidence, and cannot supply the place of the document itself—*Sheikh Ibrahim v. Parvātā Hari*, 8 Bom. H. C. R. 163.

23. In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.

Admissions in civil cases, when relevant.

*Explanation.*—Nothing in this section shall be taken to exempt any Barrister, Pleader, Attorney or Vakil from giving evidence of any matter of which he may be compelled to give evidence under section one hundred and twenty-six.

**Admission when inadmissible.**—"Confidential overtures of pacification and any other offers or propositions between litigating parties, expressly or impliedly made *without prejudice*, are excluded on grounds of public policy. For without this protective rule, it would often be difficult to take any step towards an amicable compromise or adjustment; and, as Lord Mansfield has observed: "All men must be permitted to buy their peace, without prejudice to them, should the offer not succeed."—Taylor, sec. 795.

"If a letter, sent by an Attorney, to the opposite party, be expressed to be written *without prejudice*, it cannot be received as an admission; neither can the reply be admitted, though not guarded in a similar manner."—Taylor, sec. 782.

Letters written, after a dispute has arisen, with a view to compromise and 'without prejudice' cannot be used against the party by or on whose behalf they are written—*Hoghton v. Hoghton*, 2 W. and T. 849.

**When admissible.**—Admissions made before an Arbitrator do not fall within the protection afforded by this section, but are receivable in a subsequent trial of the cause, the reference having proved ineffectual.—Taylor, sec. 798.

The privilege abovementioned may be lost if the real motive is not "to buy peace"—*Clark v. R. R.*, 29 Q. B. U. C. 136.

When the compromise offer is accepted, the privilege is at an end.

24. A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion

Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.

of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

**Definition of confession.**—"A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference, that he committed that crime."—Stephen's Digest, art. 21.

**Divisions of confessions.**—Confessions may be divided into two classes :—*Judicial* and *extrajudicial*. They may also be divided into *plenary* and *non-plenary*. Judicial confessions are those which are made before the Magistrate, or in Court, in the due course of legal proceedings ; and it is essential that they be made of the free-will of the party, and with full knowledge of the nature and consequences of the confession. Extrajudicial confessions are those which are made by the party elsewhere than before a Magistrate, or in Court ; this term embracing not only *express* confessions of crime, but all those admissions and acts of the accused from which guilt may be *implied*. *Vide* Taylor, secs. 792 and 793. A *plenary* judicial confession is a confession made by the accused before a tribunal competent to try him. It is in other words a plea of *guilty*.

**Value of confessions.**—Indeed all reflecting men are now generally agreed, that *deliberate and voluntary confessions of guilt, if clearly proved*, are among the most effectual proofs in the law ; their value depending on the sound presumption, that a rational being will not make admissions prejudicial to his interest and safety, unless when urged by the promptings of truth and conscience. Such confessions, therefore, so made by a prisoner, to any person, at any time, and in any place, are at common law, receivable in evidence, while the degree of credit due to them must be estimated by the jury according to the particular circumstances of each case.—Taylor, sec. 791.

"The evidence of *oral* confessions of guilt ought to be *received with great caution*. For not only does considerable danger of mistake arise from the misapprehension or malice of witnesses, the misuse of words, the failure of the party to express his own meaning, and the infirmity of memory—but the zeal which generally prevails to detect offenders, especially in cases of aggravated guilt, and the strong disposition which is often displayed by persons engaged in pursuits of evidence, to magnify slight grounds of suspicion into sufficient proof, together with the character of witnesses, who are

sometimes necessarily called in cases of secret and atrocious crime all tend to impair the value of this kind of evidence, and sometimes lead to its rejection."—Taylor, sec. 789.

**When confessions are not admissible.**—*Prima facie*, a confession by the prisoner is admissible as against him. In order to render a confession inadmissible, it is necessary to show :—

1st.—That it was caused by *inducement, threat or promise* ;

2nd.—That the said inducement, threat or promise, *had reference to the charge* against the person making the confession ;

3rd.—That the said inducement, threat or promise *proceeded from a person in authority* ; and

4th.—That the said inducement, threat or promise was sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that *by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him.*

**Voluntary.**—It appears that according to the law of this country the prosecution, for the purpose of introducing a confession, need not *negative* any inducement, threat or promise, unless there is good reason to suspect that something of the kind has taken place ; and in the absence of evidence, it is not to be presumed that a statement objected to on the ground of its having been induced by illegal pressure, is inadmissible. A confession is to be presumed *voluntary* unless the contrary is shewn. Although it is not to be presumed that a confession is not voluntary, yet it is necessary that the party against whom a confession is sought to be proved, must have supplied it *voluntarily*.

A confession is not involuntary, only because it appears to have been caused by the exhortations of a person in authority to make it as a matter of religious duty, or by an inducement collateral to the proceeding, or by inducements held out by a person not in authority. —Stephen's Digest, art. 22.

Mr. Best says : "There is this condition precedent to its admissibility, that the party against whom it (self-harming evidence) is adduced must have supplied it *voluntarily*, or at least *freely*. It is an established principle of English law that every confession or criminative statement ought to be rejected, which has been extracted by physical torture, coercion, or duress of imprisonment ; or which has been made after any inducement to confess has been held out to the accused, by or with the sanction, express or implied, of any



person having lawful authority, judicial or otherwise, over the charge against him, or over his person as connected with that charge. But in order to have this effect, the inducement thus held out must be in the nature of a promise of favour or threat of punishment; i.e., it must be calculated to convey to the mind of the accused that his condition, so far as it may be affected by the charge made against him, will be rendered better or worse by his consenting or refusing to confess."—Evidence, 506.

"Before any confession can be received in evidence in a criminal case, it must be shown to have been *voluntarily* made. The material question, consequently, is, whether the confession has been obtained by the influence of hope or fear; and the evidence to this point, being in its nature preliminary, is, as we have seen, addressed to the Judge, who will require the prosecutor to show affirmatively to his satisfaction, that the statement was not made under the influence of an improper inducement, and who, in the event of any doubt subsisting on this head, will reject the confession." Sec. 796. "Still, it is not necessary, in general, to do more than to show that the party receiving the confession left the prisoner at full liberty to act and judge for himself; and though it should appear that immediately before the admission was made, the accused was in the custody of another person, the Court, unless some reason exists for suspecting collusion, will not compel the prosecutor to call such person as a witness, or to prove that he did not hold out any threat or inducement. In order, however, to free the evidence from all reasonable objection, it will be prudent, especially, in important cases, to call any persons in authority, who, shortly before the confession was made, either had the prisoner in custody, or held any conversation with him."—Taylor, sec. 805.

**Inducement.**—(α). Sir James Stephen has embodied in this section the opinion of the Judges who decided the case of *Reg. v. Baldry*, 2 Den. C. C. 430. In this case, the constable, who had a prisoner in custody on a charge of felony, said to him: "You need not say anything to criminate yourself; what you say will be taken down and used as evidence against you." Lord Campbell C. J., at the trial, received in evidence the confession, subsequently made, but reserved the point for the consideration of the Court of Criminal Appeal, on the authority of the cases—*R. v. Drew*, 8 C. and P. 140; *R. v. Morton*, 2 Moo. and R. 514, and *R. v. Furley*, 1 Cox. Cr. Ca. 76. All the Judges (Pollock C. B., Parke B., Erle and Williams JJ. and Campbell C. J.) were of opinion that the statement was admissible. Pollock C. B. said: "A simple caution to the accused to tell the truth, if he says anything, has been decided not to be sufficient to prevent the state-

ment being given in evidence ; yet, even in that case, the person charged might have understood the caution as meaning that he could not tell the truth without confessing his guilt. It has been decided that that would not prevent the statement being given in evidence ; by Littledale J., in *R. v. Court*, 7 C. and P. 486 ; and by Rolfe B., in a case at Gloucester, *R. v. Holmes*, 1 Car. and K. 248 ; but where the admonition to speak the truth has been coupled with any expression importing that it would be better for him to do so, it has been held that the confession was not receivable ; the objectionable words being, ‘ that it would be better to speak the truth,’ because they import that it would be better for him to say something. This was decided in *R. v. Garner*, 1 Den. C. C. 329. The true distinction between the present case and a case of that kind is, that here it is left to the prisoner as a perfect matter of indifference whether he should open his mouth or not. With regard to the cases of *R. v. Drew* and *R. v. Morton*, with the greatest respect for my brother Coleridge, I do not approve of the decision in the former, or the arguments used in support in the latter. I think the statement in *R. v. Drew* ought not to have been rejected ; with every veneration for the opinion of my brother Maule, I cannot agree with his view of the subject.” Parke B. said : “ I have reflected on *R. v. Drew*, and *R. v. Morton*, and I have never been able to make out that any benefit was held out to the prisoner by the cautions employed in those cases.” Lord Campbell C. J. said : “ With regard to the decisions of my brother Maule, and my brother Coleridge, with the greatest respect for them, I disagree with their conclusions.”

(b). In the case of *R. v. Navroji Dadabhai*, 9 Bom. H. C. R. 358, the prisoner had been told that he had better pay the money than go to gaol and that it would be better for him to tell the truth ; it was held that the confession subsequently made by the prisoner was *inadmissible*.

(c). In *R. v. Thomas*, 6 C. and P. 353, it was said to the prisoner “ you had better spilt and not suffer for all them.” This was sufficient inducement to make the confession *inadmissible*.

(d). In *R. v. Upchurch*, 1 Moo. C. C. 465, the prisoner, a servant girl, aged thirteen, was indicted for attempting to set fire to her master’s house. After the attempt was discovered, her mistress said to her, “ Mary, my girl, if you are guilty, do confess ; it will perhaps save your neck ; you will have to go to prison ; if W. H. C. (a person whom the prisoner had charged) is found clear, the guilt will fall on you.” She made no answer. The mistress then said, “ Pray tell me if you did it.” The prisoner then confessed. The evidence was admitted.

and the point received ; but the Judges thought that it ought not to have been received.

(e). In *R. v. Hearn*, 1 Car. and M. 109, a servant was charged with attempting to set fire to her master's house. It was proved that the furniture in two bedrooms was on fire, and a spoon and other articles were found in the sucker of the pump. The master told the prisoner, that if she did not tell the truth about the things found in the pump, he would send for the constable to take her, but he said nothing to her respecting the fire. Coltman J. held, that this was such an inducement to confess as would render *inadmissible* any statement that the prisoner made respecting the fire, as the whole was to be considered as one transaction.

(f). A Deputy Magistrate before taking down a statement from a person brought before him by the Police, excluded from his presence the Police-officers, who brought him, and warned the accused saying what he would say would go as evidence against him, so he had better tell the truth : *Held*, that the use of such language was calculated to hold out an inducement to the prisoner to confess, and that a confession made in consequence, was therefore *inadmissible* in evidence against him—*Queen-Empress v. Usur*, 1. L. R. 10 Cal. 775.

(g). If a superior tells a subordinate that he will better himself by confessing, the confession is, of course, *inadmissible* ; but if he says "such and such facts look awkward, you had better explain them if you can," the explanation, if given by way of denying guilt, ought to be admitted : the object of the accused is not to better his position by confessing his guilt but to show that he is not guilty at all. *Vide R. v. Weatherspoon and others*, Madras High Court, Easter Sessions, 1874.

**Threat.**—(a). In the case of *Queen v. Hicks*, 10 B. L. R. App. 1, the accused, a sailor, had been threatened by the Captain with a loaded rifle and had then surrendered and been placed in irons. His confession was held *inadmissible*. Phear J. remarked that it was immaterial, that the threat was not for the purpose of extorting the confession but in order to suppress an attempt at mutiny.

(b). In the absence of evidence that a confession of an accused person has been induced by illegal pressure, it is not to be presumed that such confession was so induced. A confession is *inadmissible* only if the Court considers it to have been induced by illegal pressure. A confession full and clear, and properly made, may be relied upon notwithstanding its subsequent retraction—*Reg. v. Balavant Pandarker*, 11 Bom. H. G. 137.

(c). An admission by A and B that the crime charged against them was committed by C and D, and that whatever share they had in it was under compulsion, is not a confession on which any person ought to be convicted—*Queen v. Kisto Mondul and others*, 7 W. R. Cr. 8.

**Promise.**—(a). In the case of *Q. v. Radhanath Dasadh*, 8 W. R. 53 the prisoner after making a statement under promise of pardon escaped from lawful custody. On being re-arrested, he was put on his trial; the confession made by him under promise of pardon was held inadmissible.

(b). A promise of collateral boon or benefit, as for example, to give the accused some spirits (*R. v. Sexton*, 3 Russ. C. and M. 368); to take off his hand-cuffs (*R. v. Green*, 6 C. and P. 655); to let him see his wife (*R. v. Lloyd*, 6 C. and P. 393), will not be a bar to the admissibility of the confession.

(c). Where a pardon was tendered by the Magistrate to a person supposed to have been concerned with other persons in offences, none of which were exclusively triable by the Court of Session, and as such person was examined as a witness in the case, *held*, that the statement made by such person, the tender of pardon to him not being warranted by sec. 347 of Act X of 1872, was irrelevant and inadmissible as a confession—*Empress v. Asghar Ali*, I. L. R. 2 All. 260.

**Reference to the charge against the accused.**—(a). The inducement, threat or promise must have reference to the charge against the accused, and if made as to one charge will not affect a confession as to a totally different charge. The promise or threat, to have the effect of excluding the confession, must be such as is calculated to influence the prisoner's mind with respect to his escape from the charge.

(b). A confession induced by spiritual *exhortations*, whether of a clergyman (*vide R. v. Gilham*, 1 Moo. C. C. 186) or of any other person (*vide R. v. Wild*, 1 Moo. C. C. 452) is not inadmissible. If the accused was urged to speak the truth on moral grounds only, and make a confession, such confession will be receivable. (*Vide R. v. Jarvis*, L. Rep. 1 C. C. 96).

**Person in authority.**—No definition or illustration is given of the expression, 'person in authority.' The following definition is given in Stephen's Digest, art. 22. "The prosecutor, officers of justice having the prisoner in custody, Magistrates, and other persons in similar positions, are persons in authority. The master of the prisoner is not, as such, a person in authority if the crime of which the person making the confession is accused was not committed against him."

Prosecuting and arresting officers, Magistrates, jailers, and all persons in positions similar to the above, are persons in authority.—Best, 8th Ed. 526.

If the promise or threat be made by any one having authority over the prisoner in connection with the prosecution, as for instance, by the prosecutor, the master or mistress of the prisoner when the offence concerns such master or mistress, the constable, or other officer having him in custody, a Magistrate, or the like, the confession will be rejected as not being voluntary.—Taylor, sec. 797.

(a). In the case of *R. v. Navroji Dadabhai*, 9 Bom. H. C. R. 368, the accused was a booking-clerk of the G. I. P. Railway, and the travelling auditor of the company who had discovered the defalcations in respect to which the charges were made and who held out the inducement, threat or promise, was held to be a *person in authority*, Sargent C. J. remarking: "He would clearly be so, I think, according to English authorities. The test would seem to be—had the person authority to interfere with the matter—and any concern or interest in it would appear to be held sufficient to give him that authority as in *Queen v. Warringham*, 2 Den. C. C. 447a, where Parke B. held that the wife of one of the prosecutors and concerned in the management of their business was a person in authority, and we find the rule so laid down in Archbold's Criminal Practice."

(b). The master or mistress of the accused, in cases in which the alleged offence was not committed against them, have been held not to be "person in authority." Thus a confession induced by an inducement held out by the mistress of a girl, accused of the murder of her child, is admissible—*R. v. Moore*, 3 C. and K. 153.

(c). The matter before a 'panchayat' was whether M and K had murdered B, and thereby disqualified themselves from further intercourse with the rest of their brotherhood. M and B made certain statements before the panchayat, which it was afterwards sought to prove against them on their trial for the murder of B as confessions corroborating the evidence of an approver. It appeared that it was not till at the sixth meeting of the panchayat, and when M and K were threatened with excommunication from caste for life, that they made the statements. *Held*, that, if the statements attributed to M and K had been actually made, and assented to, and this fact had been duly proved, the provisions of this section could not be pleaded against their admissibility on the ground that such statements had been caused by such threat, for the members of the panchayat were *not in authority* over M and K within the meaning of this section,

nor was there any threat made having reference to any charge against them. The statements, however, were not accepted on other grounds—*Empress v. Mohan Lal*, I. L. R. 4 All. 46.

**Sufficient grounds for supposing an advantage would be gained.**—This section leaves it entirely to the Court to form its own opinion as to whether the inducement, threat or promise was sufficient to lead the prisoner to suppose that he would derive some benefit or avoid some evil of a temporal nature by confessing. The Judge in deciding all questions relating to the admissibility of extrajudicial confessions, would do well to remember the following observations of Mr. Taylor. "As the admission or rejection of a confession rests wholly in the discretion of the Judge, it is difficult to lay down particular rules, *a priori*, for the government of that discretion; and the more so, because much must necessarily depend on the age, experience, intelligence, and character of the prisoner, and on the circumstances under which the confession was made. Language sufficient to overcome the mind of one, may have no effect upon that of another."—Taylor, sec. 796.

**Temporal nature.**—(a). Where the gaol chaplain told a prisoner that, as the minister of God, he ought to warn him not to add sin to sin by attempting to dissemble with God, and that it would be important for him to confess his sins before God, and to repair, as far as he could, any injury he had done, and the prisoner after this made two confessions to the gaoler and the mayor, these confessions were held to be admissible—*R. v. Gilham*, 1 M. C. C. 186.

(b). Where a man said to a boy charged with murder—"Now kneel you down. I am going to ask you a very serious question, and I hope you will tell me the truth in the presence of the Almighty," and the boy made a statement, it was held to be strictly admissible—*R. v. Wild*, 1 M. C. C. 452.

**The exact words of the confession.**—The following observations were made by Tyrrell J., in the case of *Empress v. Mohan Lal*, I. L. R. 4 All. 46. "The statements ascribed to the appellants are in general terms, and represent only impression conveyed by what may have been said to the mind of the witnesses. It is always essential that the Court should know as nearly as possible what were the words used by the supposed confessors, and what were the questions or matters in regard to which they were said. It may have been that the words ascribed to the appellants taken with the questions put, and with the exact subject-matter of the enquiry, did not amount to a confession of the guilt believed by the hearers to have been confessed."

**The whole of a confession must be taken together.**—(a). In the proof of confessions, the whole of what the prisoner said on the subject, at the time of making the confession, should be taken together. This rule is the dictate of reason, as well as of humanity. The prisoner is supposed to have stated a proposition respecting his own connection with the crime; but it is not reasonable to assume that the entire proposition, with all its limitations, was contained, in one sentence, or in any particular number of sentences, excluding all other parts of the conversation.—Taylor, sec. 795.

(b). “There is no doubt that if a prosecutor uses the declaration of a prisoner, he must take the whole of it together, and cannot select one part and leave another; and if there be either no other evidence in the case, or no other evidence incompatible with it, the declaration so adduced in evidence must be taken as true. But if, after the whole of the statement of the prisoner is given in evidence, the prosecutor is in a situation to contradict any part of it, he is at liberty to do so, and then the statement of the prisoner, and the whole of the other evidence, must be left to the jury, for their consideration, precisely as in any other case where one part of the evidence is contradictory to another”—*R. v. Jones*, 2 C. and P. 629.

(c). The confession must be taken all together, and it is evidence for the prisoner as well as against him; still the jury, may, if they think proper, believe one part of it and disbelieve another—*R. v. Clewes*, 4 C. and P. 221.

(d). The whole, and not part of a prisoner's confession, must be taken in order to his conviction—*Queen v. Chokoo Khan*, 5 W. R. Cr. 70. See also *Queen v. Sheik Boodhoo*, 8 W. R. Cr. 38.

(e). The ordinary rule in dealing with confessions is to take them as a whole, and to give the person confessing (supposing there is no other evidence against him) the benefit of any circumstances that may appear in his favour therefrom—*Queen v. Nityo Gopal Das Byragi*, 24 W. R. Cr. 80.

Sec. 39 of the Act puts a limitation to the broad rule mentioned above, by enacting that evidence shall be given of so much, and no more of the statement, conversation, document, book, or series of letters or papers as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made. This is a salutary provision and is likely in many cases to exclude irrelevant matters; but the discretion herein given should be exercised with great caution, and in cases of doubt, the decision ought to be in favour of the admissibility of the whole statement.

**Value of confession subsequently retracted.**—(a). The confession of a prisoner before a Magistrate, though retracted before the Judge, is admissible in evidence against the prisoner, provided the Judge be satisfied that it was voluntarily made—*Queen v. Srimotty Mongola*, 6 W. R. Cr. 81. See also *Queen v. Mussamut Jenia*, 8 W. R. Cr. 40; *Reg. v. Balawant Pandarkar*, 11 Bom. H. C. 137.

(b). The properly attested confession of a prisoner before a Magistrate is sufficient for his conviction without corroborative evidence, and notwithstanding a subsequent denial before the Sessions Court—*Queen v. Bhuttun Rajwan*, 12 W. R. Cr. 49. *Vide also Queen v. Ranjit Santal*, 6 W. R. Cr. 73.

(c). Where the only evidence in a Sessions trial was confession made to a Magistrate, but subsequently retracted, and it was established that the Police misconducted themselves in the search of the prisoners who confessed and of others under trial, and produced evidence which was rejected as false, it was held that the prisoners could not safely be convicted on their own statements without any corroboration—*Safiraddin and others*, 2 C. L. R. 132.

(d). Where a prisoner was convicted of murder on a confession, retracted at the trial, corroborated by depositions read under sec. 288 of the Code of Criminal Procedure, and also retracted at the trial. *Held*, that the prisoner should not have been convicted on such evidence, as a retracted confession must be supported by independent reliable evidence corroborating it in material particulars—*Queen-Empress v. Bharmappa*, 1. L. R. 12 Mad. 123, *Queen-Empress v. Rangi*, 1. L. R. 10 Mad. 295 and *Queen v. Amanulla*, 12 B. L. R. App. 15, were approved.

(e). A Sessions Judge, after a prisoner upon his trial has pleaded what in effect amounts to a plea of not guilty, is not justified in convicting the prisoner solely upon a confession made before the Committing Magistrate—*Queen v. Hursook*, 2 N. W. P. 479.

**Confession made before accusation.**—An admission of crime, when fairly made after due warning, is not inadmissible, simply because, at the time it was made, no formal accusation had been made against the party making it—*Queen v. Ram Charn Chamar*, 4 W. R. Cr. 10.

**False confessions.**—“The prisoner, oppressed by the calamity of his situation, may have been induced by motives of hope or fear to make an untrue confession; and the same result may have arisen from a morbid ambition to obtain an infamous notoriety, from an insane or criminal desire to be rid of life, from a reasonable wish to commence a new career in another hemisphere, from an almost



pardonable anxiety to screen a relative or a comrade or even from the delusion of an overwrought and fantastic imagination."—Taylor, sec. 790.

"All false self-criminative statements are divisible into two classes; those which are the result of MISTAKE on the part of the confessionalist, and those which are made by him in expectation of BENEFIT." For a full understanding of this subject refer to Best, 514—521.

To guard against false confessions, Mr. Bentham, in his *Evi.*, Vol. VII, lays down the following rules:—

*1st.*—One is that, to operate in its character of direct evidence, the confessions cannot be too particular: in respect of all material circumstances, it should be as particular as by dint of interrogation, it can be made to be: Why so? Because (supposing it false) the more particular it is, the more distinguishable faults it will exhibit, the truth of which (supposing them false) will be liable to be disproved by their incompatibility with any facts, the truth of which may have come to be established by other evidence.

*2nd.*—The other rule is that, in respect of all material facts (especially the act which constitutes the physical part of the offence) it ought to comprehend a particular designation of the circumstances of *time and place*. For what reason? For the reason already mentioned: to the end that in the event of its proving false, may be found by which it may be proved to be so. 'I killed such a man' says the confessionalist 'on such a day at such a place.' 'Impossible' says the Judge, speaking from other evidence. 'On that day neither you nor the deceased were at that place.'

Confession to  
Police-officer not  
to be proved.

25. No confession made to a Police-officer, shall be proved as against a person accused of any offence.

**Object of the section.**—This section and secs. 26 and 27 have, with very slight alterations, been brought into this Act from Act XXV of 1861. The provisions of the latter Code differed very widely from the law of England, and were inserted in order to prevent the practice of torture by the Police for the purpose of extracting confessions from persons in their custody. The provisions of sec. 148 of Act XXV have been re-embodied in this section. Its terms are imperative, and a confession made to a Police-officer, under any circumstances, is not admissible in evidence against the person making it.\* The Courts should give the fullest effect to the provisions herein contained. One, who is acquainted with the working of the Police, will

\* *Vide Queen v. Hurribole Chander Ghose*, 1. L. R. 1 Cal. 207.

readily admit the good sense of the framers of the Code, in excluding confessions made before Police-officers. As the humane object of the enactment is to prevent confessions obtained from accused persons through any undue influence being received as evidence against them, we are inclined to think that it would have been safer if the Legislature had altogether omitted sec. 28 of the Code. The first report of the Select Committee shows, that our Legislators, after due inquiry, came to the conclusion that the powers of the Police are often abused for purposes of extortion and oppression. They remarked "a Police-officer, receiving intimation of the occurrence of a dacoity or other offence of a serious character, failing to discover the perpetrators of the offence, often endeavours to secure himself against any charge of supineness or neglect, by getting up a case against parties whose circumstances or characters are such as are likely to obtain credit for an accusation of the kind against them. This is not unfrequently done by *extorting or fabricating false confessions*, and when this step is once taken, there is, of course, impunity for the real offenders and a great encouragement to crime. The Darogah is henceforth committed to the direction he has given to the case, and it is his object to prevent a discovery of the truth; and the apprehension of the guilty parties, who, as far as the Police are concerned, are now perfectly safe. We are persuaded that any provisions to correct the exercise of this power by the Police will be futile." Long after the passing of the Act, Straight C. J., in the case of *E. v. Babu Lal* (F. B.) 6 All. 509, made the following observations regarding the action of the Police. "It requires no very vivid imagination to picture what too often takes place when two or three of these not very intellectual or highly-paid Police-officers are called away to a village to investigate a grave crime, of which there are no very clear traces. Naturally it is much the easier way for them to begin by endeavouring to obtain a confession from the suspected persons instead of searching out the clues to the evidence from independent sources, and seeing what extraneous proof there is. . . . Moreover, I have said, and I repeat now, it is incredible that the extraordinarily large number of confessions, which come before us, in the criminal cases disposed of by this Court, either in appeal or revision, should have been voluntarily and freely made in every instance, as represented. I may claim some knowledge of, and acquaintance with, the ways and conduct of persons accused of crime, and I do not believe that the ordinary inclination of their minds, which, in this respect, I take to be pretty much the same with humanity all the world over, is to make any admission of guilt. I certainly can add that, during fourteen years' active practice in the Criminal Courts in England, I do not remember

half-a-dozen instances in which a real confession, once having been made was retracted. In this country, on the contrary, the retraction follows almost invariably, as a matter of course, and though I am well aware how this is sought to be explained by a suggestion of the influence brought to bear upon the confessor by other prisoners in *havalat* (hasut), the fact remains as an endless source of anxiety and difficulty to those who have to see that justice is properly administered. I say it in no harsh sense of disparagement, but it is impossible not to feel that the average Indian Police-man, with the desire to satisfy his superiors before, and the terms of the Police Acts and Rules behind him, is not likely to be overnice in the methods he adopts to make a short-cut to the elucidation of a difficult case by getting a suspected person to confess." The malpractices of Police-officers in extorting confessions from accused persons in order to gain credit by securing convictions, is a fact known to every one, practising in our Law Courts. Such practices receive an indirect encouragement from the Executive, and as the action of Judicial officers is hampered in a great measure by the Executive, the evil can only be eradicated by the Legislature. The provisions of sec. 28 make the admissibility of a confession such as is referred to in sec. 24 a question for the Judge; but as it is extremely difficult to decide whether the impression caused by Police inducement, threat or promise has been fully removed or not, reception of such a confession as evidence on the ground mentioned in sec. 28 is likely to cause miscarriage of justice in the majority of cases.

In the case of *Empress v. Pancham*, I. L. R. 4 All. 198, Stuart C. J. said: "I should add that on this subject of the exclusion or admissibility of confessions made to a Police-officer nothing can be more unreasonable, and, I may add, unjust, than the hard and fast line that is often attempted to be drawn in this country. Sec. 25 of the Evidence Act, no doubt, provides that 'no confession made to a Police-officer shall be proved against a person accused of any offence.' Now, if this is meant to apply to all statements, however voluntarily made to a Police-officer, nothing could be more unpolitic or obstructive, and I trust that this proposition is not to be understood in any absolute sense, and under all circumstances whatever. It ought to be read and understood in connection with the other sections which follow it, particularly sec. 28, for taken by itself and applied indiscriminately it is simply irrational and absurd.....I have no doubt in my own mind that statements by Police-officers embodying and including what may be understood as a confession or admission of guilt by an accused person, are not wholly inadmissible, but may be received and applied so far as they prove merely corroborative circumstances and

not an absolute confession of guilt." This view was not shared in by the other Judge, Straight J., and it has been expressly dissented from by Norris J., in *Abu Sikdar v. Queen-Empress*, I. L. R. 11 Cal. 635, and also by Mahmood J., in *Queen-Empress v. Babu Lal*, 6 All. 509. It seems to us that a confession made before a Police-officer, can be admitted as evidence only under the provisions of sec. 27, and under no other circumstances.

**Proviso.**—It has been held by the majority of the Full Bench in *Queen-Empress v. Babu Lal*, I. L. R. 6 All. 509, that sec. 27 of the Indian Evidence Act is a proviso not only to sec. 26, but also to sec. 25; and that, therefore, so much of the information given by the accused to the Police-officer, whether amounting to a confession or not, as related distinctly to the facts thereby discovered, might be proved. See also *Queen-Empress v. Nana*, 14 Bom. 260.

**Police-officer.**—(a). It is immaterial whether such Police-officer be the officer investigating the case. The fact that such person is a Police-officer invalidates a confession—*In the matter of Hiran Miya*, alias *Abdool Wahid*, 1 C. L. R. 21.

(b). In construing this section the term 'Police-officer' is not to be read in a technical sense, but in its more comprehensive and popular meaning. A confession made before the Deputy Commissioner of Police, Calcutta, who recorded such confession in his capacity as Magistrate and Justice of the Police, was held inadmissible—*Queen v. Hurribole Chunder Ghose*, I. L. R. 1 Cal. 207.

(c). A Police patel is a Police-officer within the meaning of this section, consequently a confession made to him is inadmissible in evidence—*Queen-Empress v. Bhima*, I. L. R. 17 Bom. 485.

(d). A Village Magistrate (*vide* Mad. Act IV of 1864) is not a Police-officer. A confession made before him is admissible in evidence—*Queen-Empress v. Sama Papi*, I. L. R. 7 Mad. 287.

**Admissibility of confessions made to Police-officers for other purposes than as a confession.**—(a). Statements made to the Police by accused persons as to the ownership of property which is the subject-matter of the proceedings against them, although inadmissible as evidence against them at the trial for the offence with which they are charged, are admissible as evidence with regard to the ownership of the property in an inquiry held by the Magistrate under sec. 523 of the Criminal Procedure Code (Act X of 1882)—*Queen-Empress v. Tribhovan Manekchand*, I. L. R. 9 Bom. 131.

(b). This section does not preclude one accused person from proving a confession made to a Police-officer by another accused person tried

jointly with him. Such a confession is not to be received or treated as evidence against the person making it, but simply as evidence on behalf of the other—*Empress v. Petambur Jina*, I. L. R. 2 Bom. 61.

**Admission made to Police-officer before arrest.**—(a). An admission made by an accused person to a Police-officer before arrest is admissible in evidence—*Empress v. Dabi Persaud*, I. L. R. 6 Cal. 530. This case proceeded upon the assumption that the Evidence Act draws a distinction between an admission and confession of guilt, and Prinsep J. agreed in the opinion expressed by Phear J., in *Queen v. Macdonald*, 10 B. L. R. App. 2. A view different from what is taken in the cases mentioned above has been taken in *Empress v. Pandhari Nath*, I. L. R. 6 Bom. 34, and *Hiran Miya*, 1 C. L. R. 21. In the latter case their Lordships remarked: “the 25th sec. of the Evidence Act says, without limitation or qualification, that no confession made to a Police-officer shall be proved as against a person accused of any offence.”

(b). A Police-man on being cross-examined stated that when he arrested the prisoner, the prisoner told him *some Chinaman at the time of the occurrence* came out with hatchets; in re-examination the Police-man so far altered the words stated to have been used by the prisoner as to substitute for the words *at the time of the occurrence*, the words *at the time*; and on being asked if the prisoner had explained “what time” answered he said at the time I struck the deceased. Counsel for the prisoner interposed and objected to the evidence. The Standing Counsel contended that he was entitled to clear up a matter which had been left in doubt by the cross-examination. *Held*, that the evidence could not be given—*Queen-Empress v. Mathews*, 10 Cal. 1022.

(c). Three persons, Meher Ali Mullick, Bhutto, and Torab, were charged with the murder of one Hari in a godown. During the Police investigation, certain statements were alleged to have been made by Torab, and the clothes worn by the deceased were produced to the Police, together with an umbrella he had with him and a bill written in the Bengali character, which he had taken with him for the purpose of obtaining payment of monies due to him from Meher Ali. At the time, these statements were made; Meher Ali was under arrest, but neither of the other two accused was suspected of having had any hand in the murder, and they were not then under arrest. The statements, the prosecution sought to give in evidence, were the following, and made under the following circumstances: “A Superintendent of Police, during the course of his evidence, stated that, on going to the godown where the murder was alleged to have been committed, he saw Torab there, and he asked him if he had seen Hari the previous

day." Torab said : (1) Hari had come the previous day at noon to the premises, but that he did not know when he left. The witness on telling Torab to empty his box, Torab produced the Bengali bill referred to above, and made the following statement : (2) "Sir, I have something to give you. Meher Ali gave me this paper yesterday evening to keep for him." After producing the bill, Torab made the following statement : (3) "Hari came here yesterday at 1 P.M. Hari and I and Bhutto and Meher Ali were seated in this room looking over his account, when Hari took sick with cholera ; he went out of the room three times to ease himself, and came back and sat down, when angry words passed between him and Meher Ali." Torab made a further statement. On the objection of the Counsel for defence, the whole statement, as recorded by the Coroner, was attempted to be put in. The statement was recorded as follows : (4) "Torab said that the deceased Hari had called the previous day, was taken ill with cholera, purged three times, after which a dispute arose regarding accounts in Exhibit F (the Bengali bill) ; that Hari had abused Meher Ali's wife, on which Meher Ali had given Hari a push in the throat, when Hari fell backwards and became insensible ; that they tried to get a box from the second shelf from the west of the room ; that they tried to put the corpse into the box ; it was too big ; that they had to tie the body to make it fit into the box ; that they then put the lid on, after placing a sheet on the body ; that they covered the box with a gunny, and then tied it up with a rope ; that they left the box till evening ; and that at 6 P.M. Meher Ali got a cooly, and had the box removed through the small door of the Institution opening into Free School Street." Counsel for defence objected to all the statements, but during argument, he withdrew his objection to statement (1), on the ground of its being perfectly innocuous. The Standing Counsel argued that the statements made by Torab were admissible in evidence, as he was not then under arrest, and that they were not confessions but were admissions, and, reference was made to *Queen v. Macdonald* (10 B. L. R. App. 2) and *Empress v. Dabi Prasaud* (I. L. R. 6 Cal. 530). Wilson J. observed : "I have come to the conclusion that evidence can be given as to what Torab said when he made over the paper to the Police, but that evidence of the other statements sought to be proved cannot be given"—*Queen-Empress v. Meher Ali Mullick*, I. L. R. 15 Cal. 589.

Mr. Field, who is a great authority on the subject of Evidence, says : "From these rulings it would seem doubtful whether *Queen v. Macdonald* and *Empress v. Dabi Prasaud* should now be followed." It seems to us that these two rulings are of doubtful authority.

They are based upon a distinction which, we presume, the Code does not recognise and opposed to the principle of law which guided the Legislature in embodying in this section the salutary provision making admissions of guilt made before Police-officers inadmissible in evidence.

**Self-exculpatory statement to Police-officer.**—A statement made to a Police-officer by an accused person while in the custody of the Police, although intended to be made in self-exculpation, and not as a confession, may be nevertheless an admission of a criminating circumstance, and, if so, under this section and sec. 26, it cannot be proved against the accused. Melvill J. observed : “The witness No. 14, a Police-officer, says : ‘The accused was sent for, and shown this cheque, and he said that one Kishan had given it to him. This was at the *faraskhāna*. He was in custody. Accused said this after his arrest.’ This statement of the prisoner, that Kishan had given him the cheque, was used by the prosecution as an admission by the prisoner that he had had possession of the cheque, and it was put to the jury as amounting to such an admission. It is contended that secs. 25 and 26 of the Indian Evidence Act prohibit such a use of such a statement when made to a Police-officer, or by a person in custody of a Police-officer ; and we have come to the conclusion that this contention is well founded. It is true that the statement in question was probably not intended as a confession of guilt, but was rather made by the prisoner in self-exculpation ; but it is, nevertheless, an admission of a criminating character on which the prosecution mainly relies, and formed, indeed, the most important part of the evidence against the accused. We think that such an admission comes properly within the rule of exclusion which the Legislature has laid down in regard to confessions made by a person in custody of the Police”—*Imperatrix v. Pandharinath*, I. L. R. 6 Bom. 34. See also *Queen-Empress v. Nana*, I. L. R. 14 Bom. 260 (F. B.)

26. No confession made by any person whilst he is in the custody of a Police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

Confession by accused while in custody of Police not to be proved against him.

The provisions of sec. 149 of Act XXV of 1861, have been re-embodied in this section.

**Purport of the section.**—This section is not intended to qualify sec. 25, but means that no confession, made by a prisoner in custody, to any person other than a Police-officer, shall be admissible,

unless made in the presence of a Magistrate.\* It must not be supposed that this section and the preceding one contain identical propositions of law. The two sections do not overlap each other. Sec. 25 lays down a *general* proposition against the admissibility of confessions made to Police-officers. Sec. 26 carries the principle further by rendering similar confessions inadmissible, even though *not made to Police-officers*, but made by a person *whilst he is in the custody of a Police-officer*. In sec. 25, the criterion for excluding the confession is the answer to the question, "To whom was the confession made?" If the answer is that it was made to a Police-officer, the law says that such confession shall be absolutely excluded from evidence, because the person to whom it was made is not to be relied on, for proving such a confession, and he is, moreover, suspected of employing coercion to obtain confessions. On the other hand, the criterion adopted in sec. 26 for excluding confessions is the answer to the question, "Under what circumstances was the confession made?" If the answer is that it was made whilst the accused was in the custody of a Police-officer, the law lays down that such confession shall be excluded from evidence, unless it was 'made in the immediate presence of a Magistrate.'† Both these provisions obviously proceeded on the assumption that confessions, made to the Police by accused persons, while in their custody or not, or to third persons while in their custody, unless, in the latter case, they were guaranteed by the presence of a Magistrate, were valueless as evidence, because of the experience which has created an apprehension that they might not be voluntary, and might be false.

(a). The object of sec. 26 of the Evidence Act appears to prevent the abuse of their powers by the Police, and hence confessions made by accused persons while in custody cannot be proved against them, unless made in the presence of a Magistrate. But if a man in custody of the Police volunteers a statement to a person in the position of a Magistrate, there can be no ground for saying that such statement cannot be used as evidence against the man who makes it—*Queen v. Monomohun Roy*, 24 W. R. Cr. 33.

**Magistrate.**—(a). A Village Munsif in the Madras Presidency is such a Magistrate as is contemplated by this section—*Empress v. Ramanjiyya*, I. L. R. 2 Mad. 5.

(b). A confession made before a Presidency Magistrate, during Police investigation, is admissible as evidence under this section—*Queen-Empress v. Nilmadhab Mitter*, I. L. R. 15 Cal. 595.

\* *Queen v. Haribole Chunder Ghose*, I. L. R. 1 Cal. 207.

† *Vide* judgment of Mahmood J., in *Empress v. Babu Lal*, I. L. R. 6 All. 509.



**Inadmissible statements.**—(a). The mere standing by of the Magistrate when the confession is being made to the Police is not sufficient to make the confession admissible—*Queen v. Doman Kahar*, 12 W. R. 82.

(b). If a person while in custody as an accused gives information to the Police as complainant in another case, his statement as such informant cannot be used as evidence against him on his trial—*Moher Sheikh v. Queen-Empress*, I. L. R. 21 Cal. 392.

(c). Statement made in self-exculpation and not as a confession, may be nevertheless an admission of a criminating circumstance, and as such, inadmissible—*Empress v. Pandharinath*, I. L. R. 6 Bom. 34.

27. Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a Police-officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

The provisions of sec. 150 of Act XXV of 1861 were brought with slight modifications into this section.

**Reason of the rule.**—The broad ground for not admitting confessions made to a Police-officer is to avoid the danger of admitting false confessions, but the necessity for the exclusion disappears in a case provided for by this section, when the truth of the confession is guaranteed by the discovery of facts in consequence of the information given ; therefore, so much of the information given by the accused to the Police-officer, whether amounting to a confession of guilt or not, as related distinctly to the facts thereby discovered, might be proved.\*

The section is very inartistically drawn. Straight C. J. remarked : " I say it with the deepest respect for the learned authors, that sec. 27 is not perhaps as happily drawn as it might have been."\*

This section is a proviso not only to sec. 26, but also to sec. 25. *Vide* I. L. R. 6 All. 509.

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\* *Vide Queen-Empress v. Babu Lal*, (F. B.) I. L. R. 6 All. 509.

This section was framed on sec. 824, Taylor on Evidence, which runs thus: "Where in consequence of information unduly obtained from the prisoner, the property stolen, or the instrument of the crime, or the body of the person murdered, or any other material fact has been discovered, proof is admissible that such discovery was made conformably with the information so obtained. The prisoner's statement as to his knowledge of the place where the property or other article was to be found, being thus confirmed by the fact, is shewn to be true and not to have been fabricated in consequence of any inducement. It is therefore competent to prove that the prisoner stated that the thing would be found by searching a particular place, and that it was accordingly so found; but it would not be competent to inquire whether he confessed that he had concealed it there. Lord Eldon has laid down this rule somewhat more strictly, saying in *Harvey's Case*, that where the knowledge of any fact was obtained from a prisoner under such a promise as excluded the confession, from being given in evidence, he should direct an acquittal, unless the fact proved would itself have been sufficient to warrant a conviction, without any confession leading to it. But the sounder doctrine seems to be that so much of the confession as relates distinctly to the fact discovered by it may be given in evidence, as this part at least of the statement cannot have been false."

**Relates distinctly.**—These words are borrowed from Taylor, but they are deficient in precision and they must be taken to mean that evidence may be given to prove that the discovery was made conformably with the information so obtained from the accused, not that all the statements made on the same occasion by the accused are necessarily admissible. See *Reg. v. Jora Hasri*, 11 Bom. H. C. R. 242.

**Test of admissibility of statements made in the custody of Police.**—(a). The test of the admissibility, under this section, of information received from an accused person in the custody of a Police-officer, whether amounting to a confession or not, is:—was the fact discovered by reason of the information, and how much of the information was the immediate cause of the fact discovered, and as such, a relevant fact—*Queen-Empress v. Commer Sahib*, I. L. R. 12 Mad. 153.

(b). The discovery of a fact which, save for the confession, would be altogether indifferent, cannot take a confession out of the excluding rule—*Choda Aichenah*, 3 Mad. H. C. R. 318.

**How much of the statement to be admitted.**—"No Judicial Officer dealing with such provisions should allow one word more to be deposed to by the Police-officer detailing a statement made to him by an accused, in consequence of which he discovered a fact, than

is absolutely necessary to show how the fact that was discovered is connected with the accused, so as in itself to be a relevant fact against him. Sec. 27 was not intended to let in a confession generally, but only such particular part of it as set the person to whom it was made in motion and led to his ascertaining the fact or facts of which he gives evidence." Observations of Straight C. J., in *Queen-Empress v. Babu Lal*, I. L. R. 6 All. 509.

In the above case Straight C. J. also observed that where a statement is being detailed by a constable as having been made by an accused, in consequence of which he discovered a certain fact or certain facts, the strictest precision should be enjoined on the witness, so that there may be no room for mistake or misunderstanding. In detailing statements of this kind, which are alleged to have led to discovery, it is of the essence of things that what each prisoner said should be precisely and separately stated. If the evidence was not clear upon this point, and the witness refused to be more explicit, the Judge should have paid no attention to it.

**Fact discovered in consequence of information given.**—(a). P, accused of the murder of a girl, gave to a Police-officer a knife, saying it was the weapon with which he had committed the murder. He also said, that he had thrown down the girl's anklets at the scene of the murder, and would point them out. On the following day he accompanied the Police-officer to the place where the girl's body had been found, and pointed out the anklets. *Held*, that such statements, being confessions made to a Police-officer, whereby no fact was discovered, could not be proved against P—*Empress of India v. Pancham*, I. L. R. 4 All. 198.

(b). B and R, accused of offences under sec. 414 of the Indian Penal Code, gave information to the Police which led to the discovery of the stolen property. This information was to the effect that the accused had stolen a cow and a calf, and sold them to a particular person, at a particular place. The Police-officer's statement to the effect: "They said they got the cow from Lachman Teli, they said they had stolen a cow and a calf, they have stolen it from Sukhni Garaiyin of Jaitpur; they had stolen a goat in Belupur and sold it," was held inadmissible. The only fact about the cow and calf which was admissible, as distinctly relating to the discovery of these animals at Abdul Rahaman Julaha's, was that they sold it at Madan to him—*Queen-Empress v. Babu Lal*, (F. B.) I. L. R. 6 All. 509.

(c). When a Police-officer deposed that an accused person had told him that he had robbed K of Rs. 48, whereof he had spent Rs. 8 and had got Rs. 40, and that he had made over the Rs. 40 to him (the

Police-officer); *held*, that the statement that he robbed K of Rs. 48 was not necessarily preliminary to the surrender of Rs. 40 and was inadmissible in evidence against the accused.

When, also, a Police-officer deposed to the fact that the accused who was charged with murder, had stated to him that he and K had stolen some hides from C, and upon such statement he had sent for C, and recorded his information, and when it appeared that C had already informed the Police of the fact of the theft, though the witness was aware of it; *held*, that the statement was inadmissible upon the ground that it would be most dangerous to extend the provisions of sec. 27, and allow a Police-officer, who is investigating a case, to prove an information received from a person accused of an offence in the custody of a Police-officer, on the ground that a material fact was thereby discovered by him, when that fact was already known to another Police-officer—*Adu Shikdar v. Queen-Empress*, I. L. R. 11 Cal. 635.

(d). The accused were charged with theft of some *jawari*. During the Police investigation they admitted before the Police that they had taken the grain and concealed in a jar, which they forthwith produced. The identity of the *jawari* recovered with that stolen was not proved to the satisfaction of the trying Magistrate except by these admissions; they were convicted of theft. *Held*, that as the prisoners themselves produced the *jawari*, it was by their own act and not from any information given by them, that the discovery took place. This section, therefore, did not apply, and though the fact of the production of the property might be proved, the accompanying confession made to the Police was inadmissible in evidence—*Queen-Empress v. Kamalia*, 10 Bom. 595. *Empress v. Pancham*, 4 All. 198, *Queen-Empress v. Babu Lal*, 6 All. 509 followed.

(e). In the case of *Queen-Empress v. Nana*, I. L. R. 14 Bom. (F. B.) 260, the accused was charged, under sec. 411, Indian Penal Code, with dishonestly receiving stolen property. In the course of the Police investigation, the accused was asked by the Police where the property was. He replied that he had kept it, and would show. He said he had buried the property in the fields. He then took the Police to the spot where the property was concealed, and with his own hands disinterred the earthen pot in which the property was kept. He made a second statement when pointing out the spot to the effect that he had buried the property there. It was contended that those statements were inadmissible having been made when the accused was in custody of the Police. *Held*, 1st—That the above statements were clearly in the nature of a confession and therefore properly within

the rule of exclusion in regard to confessions made by a person in custody of the Police ; 2<sup>nd</sup>—That the statements were not admissible under sec. 8, ex. (1) as evidence of the conduct of the accused ; 3<sup>rd</sup>—That the accused's statement that he had buried the property in the fields was admissible in evidence under sec. 27, as it set the Police in motion and led to the discovery of the property.

In the above case it was held that a statement is equally admissible under this section, whether the statement is made in such detail as to enable the Police to discover the property themselves, or whether it be of such a nature as to require the assistance of the accused in discovering the exact spot where the property is concealed.

(f). The accused made a confession to a Police-Inspector, part of which related to the concealment of certain jewels, and in consequence of the information so received, the jewels were discovered. *Held*, that under sec. 27 that part of the accused's confession which described his assault on the deceased, and her consequent death, and the way in which he became possessed of the jewels, related distinctly to the fact of the discovery of the ornaments, and might be proved against the accused—*The Queen v. Pagaree Saha*, 19 W. R. Cr. 51. This decision seems to be of doubtful authority.

(g). In the case of *Reg. v. Jora Hasji*, 11 Bom. H. C. R. 242, West J. said : "It is not all statements connected with the production or finding of property which are admissible ; those only which lead immediately to the discovery of property, and so far as they do lead to such discovery, are properly admissible.....A man says, 'You will find a stick at such and such a place. I killed Rama with it.' A Police-man in such a case may be allowed to say he went to the place indicated and found the stick ; but any statement as to the confession of murder would be inadmissible. If, instead of 'you will find,' the prisoner had said, 'I placed a sword or knife in such a spot,' where it was found ; that, too, though it involves an admission of a particular act on the prisoner's part, is admissible, because it is the information which has directly led to the discovery, and is thus distinctly and independently of any other statement connected with it.....If under cover of explanation said to have been given by a prisoner of an act in itself ambiguous, or not so obviously connected with a fact in issue as to be relevant, it is sought to introduce a confession of a prisoner to the Police, the Evidence Act does not warrant its admission. The rules of exclusion and the exception to them being definitely laid down, the exception is not to be extended to cases not properly falling within it. The giving up by a cultivator of a billhook, or the pointing out of a place where *bajri* appears to have been trampled, is however an

unambiguous act. It is in general also insignificant. It needs no explanation, and a confession accompanying it does not explain it, but is a collateral matter, whose exclusion (where it is excluded) is not prevented by its being connected with matters that are not excluded."

(h). See *Empress v. Rama Birapa*, I. L. R. 3 Bom. 17.

(i). When a fact is discovered in consequence of information received from one of several persons charged with an offence, and when others give like information, the fact should not be treated as discovered from the information of them all. It should be deposed that a particular fact has been discovered from the information of A B, and this will let in so much of the information as relates distinctly to the information therein discovered—*Queen v. Ram Charan Chung*, 24 W. R. 36.

28. If such a confession as is referred to in section twenty-four is made after the impression caused by any such inducement, threat or promise has, in the opinion of the Court, been fully removed, it is relevant.

Confession made after removal of impression caused by inducement, threat or promise relevant.

*Vide* notes to sec. 25.

This section expressly forms an exception to the law provided by sec. 24, and leaves the matter of the admissibility of the confession referred to, to the discretion of the Judge.

**Removal of impression.**—"Thus, where a Magistrate told a prisoner, charged with murder, that, if he was not the man who struck the fatal blow, and would disclose all he knew respecting the matter, he would use his influence to protect him, but on subsequently receiving a letter from the Secretary of State refusing mercy, he communicated its contents to the prisoner, it was held that a confession, which the prisoner afterwards made to the Coroner, who had also duly cautioned him, was clearly voluntary, and as such, it was admitted. So, when the accused had been induced by promises of favor to make a confession, which was for that cause excluded, but some months afterwards, and after he had been solemnly warned by two Magistrates that he must expect death and prepare to meet it, he again fully acknowledged his guilt, this latter confession was received in evidence."—Taylor, sec. 878.

There ought to be strong evidence to show that the impression, under which the first confession was made, was afterwards removed,

and the second confession was the result of reflection and voluntary determination.

"Where promises or threats have been once used of such a nature as to render a confession inadmissible, all *subsequent* admissions of the same or the like facts will be rejected, unless from the length of time intervening, from proper warning of the consequences, or from other circumstances, there be good reason to presume, that the delusive hope or fear which *influenced* the first confession has been *effectually dispelled*. Where it appears to the satisfaction of the Judge that the improper *influence was totally done away before* the confession was made, the evidence will be received."—Taylor, sec. 802.

(a). Where the committing Magistrate told the prisoner, that, if he would make a confession, he would do all he could for him, and no confession was then made, but, after his committal, the prisoner made a statement to the turnkey, who held out no inducement and gave no caution; Parke, J. said, he thought the evidence ought not to be received after what the committing Magistrate had said to the prisoner, more especially as the turnkey had not given any caution—*R. v. Cooper*, 5 C. and P. 525.

(b). The accused confessed to a Police-constable, on being assured by him that nothing would happen to her, that she had killed her new-born child, and buried it in the enclosure of her house. This statement led to the discovery of some bones of the head of an infant, a stone stained with blood, and a knife, with which stone and knife, the woman said that she had killed her child. Before the committing Magistrate she, after due caution, made the same statement. In her trial before the Sessions Judge, she admitted the birth of the child. She stated that it did not cry, and that she buried it, not knowing whether it was alive or dead. She also stated that the Police-constable had pressed and threatened her, and told her that, if she confessed the truth, nothing would happen to her. She denied having killed the child with the stone and sickle and said that she had merely pressed it on the ground, and then buried it. There was no evidence to show that the child was born alive. *Held*, that the confession before the Magistrate was irrelevant, and that the Court was not prepared to say that the confession made before the Sessions Judge was made after the impression caused by the promise of the Police-constable had been fully removed, and that, looking at the fact that a promise of safety had been made, that the confession was, even if accepted, of a limited character, that there was nothing to show that the child was born alive, and considering that, if the child was born

dead, the accused might, under fear of exposure and disgrace, have wished to conceal the body, the accused must be acquitted of murder—*Queen v. Mussumat Luchoo*, 5 N. W. P. 86.

(c). A prisoner had made a confession to one of the prosecutors in a charge of larceny, which, it was admitted, could not be received in evidence, on account of what had passed between the prisoner and a constable who had her in charge. In the afternoon of the same day, another of the prosecutors went to the prisoner's house and entered into conversation with her about the stolen property, when she repeated the confession she had made in the morning, but no promise or menace was on this occasion held out to her. Taunton J. said that the second confession was not receivable, it being impossible to say, that it was not induced by the promise which the constable made to the prisoner in the morning—*R. v. Meynell*, 2 Lewin, C. C. 122.

29. If such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because

Confession otherwise relevant not to become irrelevant because of promise of secrecy, &c.

it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.

**Principle of rule.**—"The rule laid down in sec. 23 as to admissions in civil suits, does not apply to criminal cases. Here the great object is to ascertain innocence or guilt, and consequently, so long as the truthfulness of the confession is secured, the law does not regard any limitations imposed by the person confessing as to its future employment against him, nor will it recognize, even in the case of confessions to a spiritual adviser, a promise not to reveal such a confession. Evidence in such cases is consequently admissible, notwithstanding that the person giving it may have obtained his information in an informal manner, or may be doing a dishonour-



able act in revealing it ; as *e.g.*, where a man has purposely been made drunk with a view to confession, or where the accused has been tempted to write to his friends, and his letters have been opened, or where he has been led to confess by a false representation that his accomplices have confessed.”—Cunningham’s Evi. Act, 148.

**Promise of secrecy.**—A, a fellow-prisoner, said to B, who was in custody for murder, “I wish you would tell me how you murdered the boy, pray split.” B replied, “will you be on your oath not to mention what I tell you?” A promised on his oath and then B confessed. B’s confession was admitted in evidence—*R. v. Shaw*, 6 C. and P. 372.

**Deception.**—(a). In the case of *Queen v. Ram Churn Ghose*, 20 W. R. Cr. 33, the confession made by the prisoner before the Assistant Magistrate, was objected to, on the ground that the Police-officer practised deception upon the accused before he confessed, saying that the prisoner’s brother-in-law had given out that he (prisoner) was guilty. The Judges remarked : “If this amounted to anything at all, it was a deception practised on the prisoner, but though we might disapprove of any deception being practised, sec. 29 expressly says that a confession made in consequence of a deception is not to be excluded. What, it seems to us, we have to consider is not any technical objection of that kind, but whether or no, under all the circumstances of this case, we can fairly trust that the statement made by the prisoner before the Assistant Magistrate was made by him under such circumstances that we may safely rely upon it.”

(b). It is no objection that the confession was made under a mistaken supposition that some of the prisoner’s accomplices were in custody, and even though some artifice has been used to draw him into that supposition—*R. v. Burley*, East. T. 1818.

(c). Where a turnkey was asked by the prisoner if he would put a letter into the post, and, on receiving a promise that he would do so, gave him the letter, which was detained by the turnkey and given in evidence as a confession at the trial ; the letter was received in evidence—*R. v. Derrington*, 2 C. and P. 418.

(d). Where a person took an oath that he would not mention what the prisoner would tell him and the prisoner made a confession, such confession was held admissible in evidence—*R. v. Shaw*, 6 C. and P. 373.

**Drunk.**—A confession was made by the prisoner while drunk, and to whom liquor was given to cause him to be so. On its being objected that what the prisoner said under such circumstances was not receivable in evidence, Coleridge J. said, “I am of opinion that a

statement made by a prisoner while he was drunk is not therefore inadmissible; it must either be obtained by hope or fear. This is matter of observation for me, upon the weight that ought to attach to this statement when it is considered by the jury"—*R. v. Spilsbury*, 7 C. and P. 187.

**Questioning, &c.**—(a). A confession is admissible in evidence where it has been elicited by questions put by a person in authority—*R. v. Thornton*, 1 Moo. C. C. 27.

(b). It does not appear that it makes any difference that the questions put assume the guilt of the prisoner.—*Phill. Evi.*, 10th Ed., 421.

(c). The evidence of a Police-man who overheard a prisoner's statement made in another room, and in ignorance of the Police-man's vicinity, is admissible—*Queen v. Sageena*, 7 W. R. Cr. 56.

**Warning.**—No warning is necessary to make a confession admissible in evidence. *Vide* (1)—*Queen v. Navadvipa Goswami*, 1 B. L. R. O. Cr. 15; (2)—*Queen-Empress v. Uvir*, 1 L. R. 10 Cal. 775. See also sec. 163, Criminal Procedure Code.

30. When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

Consideration of proved confession affecting person making it and others jointly under trial for same offence.

### *Illustrations.*

(a). A and B are jointly tried for the murder of C. It is proved that A said,—‘B and I murdered C.’ The Court may consider the effect of this confession as against B.

(b). A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said,—‘A and I murdered C.’ This statement may not be taken into consideration by Court against A, as B is not being jointly tried.

**Reason of the rule.**—This section forms an important exception to the general principle of law that the confession of an accused person is

not evidence against any one but himself. Mr. Jackson J., who was one of the Judges who decided the case of *Ashutoosh Chuckerbutty*, 4 Cal. 483, has given the reason which probably led Sir J. F. Stephen to make this important change in the law. He said, "In truth it seems impossible to avoid in such cases producing an effect upon the mind when a confession is read, extending to every person named in the confession ; even the Judge with the best balanced mind conceivable, if he spoke with absolute sincerity and self-examination, would probably admit that his mind was in some degree affected by the confession of one man criminating another, provided that he believed the confessing prisoner to be in the main veracious. It may be, therefore, that the Legislature did wisely in recognizing and taking under its control the impression thus unavoidable, which might actually do more harm if unrecognized."

**Infirmity of such evidence.**—Until the passing of the present Act such dangerous material as this could not be used as evidence against another accused person ; but it must be remembered that such confessions are evidence of a peculiarly infirm and defective character, requiring specially careful scrutiny before they can be taken into consideration, and Judges should bear in mind that an accused person, other than he who has confessed, cannot lawfully be convicted upon such confessions alone, nor ought he be convicted on the ground of such confession being corroborated by circumstantial evidence, unless the circumstances constituting corroboration would, if believed to exist, themselves support a conviction. The Judges of the several High Courts of this country have strictly interpreted the provisions of this section. The following observations should be borne in mind when dealing with such evidence :—

(a). Phear J., in the case of *The Queen v. Jadu Mondul*, 21 W. R. Cr. 69, said : "Until the passing of the Indian Evidence Act, such dangerous material as this (confession of a fellow-prisoner) could not be used as evidence against the accused person, and even by that Act the Legislature only bestowed a discretion upon the Court to *take into consideration* such confession as against such other person as well as against the person who makes such confession." The same Judge, in the case of *The Queen v. Naga and others*, 23 W. R. Cr. 24, remarked : "And it is obvious that the confessions of co-prisoners are characterized by a very serious infirmity as regards the prisoners against whom they were sought to be used under sec. 30 of the Evidence Act. In addition to the infirmity inherent in an accomplice's testimony, *i.e.*, they are neither sanctioned by an oath, nor can they be tested, developed, or explained by cross-examination, . . . . it is, we conceive, generally unsafe to use materials of this

character against persons under trial without carefully bearing in mind its special infirmity of character."

(b). In the case of *The Queen v. Chunder Bhattacharjee*, 24 W. R. Cr. 42, L. S. Jackson J. observed : "The section (sec. 30 of the Evidence Act) does not provide, as has been repeatedly pointed out by this Court, that such confession is evidence, still less does it say that it shall be the foundation of a case against the person implicated. The Legislature very guardedly says that it may be 'taken into consideration,' and I think that the obvious intention of the Legislature in so saying was that, when, as against any such person, there is evidence tending to his conviction, the truth or completeness of this evidence being the matter in question, the circumstance of such person being implicated by the confession of one of those who are being jointly tried with him, should be taken into consideration as bearing upon the truth or sufficiency of such evidence."

(c). In the case of *Queen-Empress v. Jagrup and another*, I. L. R. 7 All. 646, Straight J. observed : "What was intended (by the Legislature) was, that where a prisoner—to use a popular phrase—'makes a clean breast of it,' and unreservedly confesses his own guilt, and at the same time implicates another person who is jointly tried with him for the same offence, his confession may be taken into consideration against such other person as well as against himself, because the admission of his own guilt operates as a sort of sanction which, to some extent, takes the place of the sanction of an oath, and so affords some guarantee that the whole statement is a true one. But where there is no full and complete admission of guilt, no such sanction or guarantee exists ; and, for this reason, the word 'confession' in sec. 30 cannot be construed as including a mere inculpatory admission which falls short of being an admission of guilt."

(d). West J., in *Empress v. Daji Nasru and Govinda Natha*, I. L. R. 6 Bom. 288, remarked : "When a person admits guilt to the fullest extent, and exposes himself to the pains and penalties provided for his guilt, there is a guarantee for his truth, and the Legislature provides that his statement may be considered against his fellow-prisoners charged with the same crime."

(e). In the case of *Jaffir Ali*, 19 W. R. Cr. 57, Glover J. observed : "Sec. 30, Act I of 1872, introducing as it does an entirely new, and, I am inclined to think, rather dangerous element into the conduct of criminal trials, ought to be construed with great strictness."

**Joint trial.**—(a). Several prisoners being charged together with house-breaking, some of them pleaded guilty. The Sessions Judge used the confessions made by those who pleaded guilty as evidence

against a prisoner who was tried. *Held*, that such confessions were not evidence under this section, as the confessing prisoners were not tried at all—*Venkatasami and others v. The Queen*, I. L. R. 7 Mad. 102. See *Empress v. Bala Patel*, I. L. R. 5 Bom. 63.

(b). A confession made by one accused cannot be used as evidence against another, after the person making it has been convicted and sentenced—*Reg. v. Kalu Patel*, 11 Bom. H. C. R. 146.

(c). This section applies only to cases in which the confession is made by a prisoner tried *at the same time* with the accused person, against whom the confession is used—*Queen v. Sheikh Buxoo*, 21 W. R. Cr. 65.

(d). Two persons were jointly tried before the Sessions Judge on a charge of murder. The Sessions Judge examined each of the accused in the absence of the other, making the latter withdraw from the Court during the examination of the former, though without objection from the pleaders of the accused person : *Held*, that the examination of the accused could be used only against himself, and not against his fellow-accused—*Empress v. Lakshman Bala and Bala Ramseth*, I. L. R. 6 Bom. 124.

(e). Several persons were charged together with several offences. The Sessions Judge, when about to examine the prisoners, required all but the prisoner under examination to withdraw from the Court, until his turn for examination came round, and convicted each prisoner chiefly upon what was said by his co-prisoner during his absence from the Court. *Held*, that the evidence so given was inadmissible—*The Empress v. Chundranath Sarkar*, I. L. R. 7 Cal. 65.

**Same offence.**—(a). The confession of one person is not admissible in evidence against another, although the two are jointly tried, if one is tried for the abetment of the offence for which the other is on his trial—*The Queen v. Jaffir Ali and others*, 19 W. R. Cr. 57.

(b). Upon the trial of A for murder, and B for abetment thereof, a confession by A implicating B cannot be taken into consideration against B under this section—*Badi v. The Queen-Empress*, I. L. R. 7 Mad. 579.

(c). Statements made by one set of prisoners criminating another set of prisoners, when each individual prisoner made a case for himself on which he was free from any criminal offence, ought not to be taken into consideration against the prisoners of the second set, when the two sets, although tried together, were tried upon totally different charges—*Queen v. Bunwarilol*, 21 W. R. Cr. 55.

(d). Where two prisoners are tried together for different offences committed in the same transaction, *e.g.*, the one as the thief of certain articles and the other as the receiver of those articles, knowing them to be stolen property, the confession of one cannot be used as evidence against the other—*In re A. David*, 5 C. L. R. 574.

(e). When two persons are accused of an offence of the same definition arising out of a single transaction, the confession of the one may be used against the other, though it inculcates himself through acts separable from those ascribed to his accomplice, and capable, therefore, of constituting a separate offence from that of the accomplice; and capable, therefore, of constituting a separate offence from that of the accomplice. The object sought by the rule of law is a safeguard for sincerity and for information, and this safeguard equally subsists in the case supposed as where the confession implicates both in an identical act—*Queen-Empress v. Nur Mahomed*, I. L. R. 8 Bom. 223.

**Statement must substantially implicate the person making it.**—This section means that the statement of fact made by the prisoner, which amounts to a confession of guilt on his part, may be taken into consideration so far, and so far only, as that particular statement of fact itself extends, against the other prisoners who are being tried, as well as himself, for the offence which is thus confessed.\* The test that this section intended should be applied to a statement of one prisoner proposed to be used in evidence as against another, is to see whether it is sufficient by itself to justify the conviction of the person making it, of the offence for which he is being jointly tried, with the other persons against whom it is tendered. In fact, to use a popular and well-understood phrase, the confessing prisoner must tar himself and the person or persons he implicates, with one and the same brush.†

(a). Before a confession of a person jointly tried with the prisoner can be taken into consideration against such prisoner, it must appear that that confession implicates the confessing person substantially to the same extent as it implicates the person against whom it is to be used in the commission of the offence for which the prisoners are being jointly tried—*The Queen v. Belat Ali Moonshee and others*, 19 W. R. Cr. 67.

(b). Statements made by a prisoner before the committing officer, which implicate his fellows, and exculpate himself, cannot be regarded as evidence under this section—*The Queen v. Keshub Bhoonia and others*, 25 W. R. Cr. 8.

\* *Queen v. Mohes Biswas*, 19 W. R. Cr. 16.

† *Empress v. Gunraj*, I. L. R. 2 All. 444.

(c). The statement of one prisoner cannot be taken as evidence against another prisoner under sec. 30, unless the parties are admittedly *in pari delictu*, when, that is, the confessing prisoner implicates himself to the full as much as his co-prisoner whom he is criminating—*The Queen v. Baijoo Chowdhry and others*, 25 W. R. 43.

(d). Where the confession of a person being tried jointly with other persons did not implicate him to the same extent as it implicated such other persons, and was not sufficient of itself to justify his conviction, *held*, that such confession could not be taken into consideration under this section, against such other persons—*Empress v. Ganraj and others*, I. L. R. 2 All. 444.

(e). In the case of *Empress v. Mulu*, I. L. R. 2 All. 646, it was held, that where a person being tried jointly with other persons made a statement deprecating any guilty knowledge, and seeking to clear himself at the expense of such other persons, such statement could not be taken into consideration under this section.

(f). A prisoner, charged together with others with being a member of an unlawful assembly, made a statement before the committing Magistrate, implicating his fellow-prisoners and another person. He subsequently withdrew this statement, and made another in which he endeavoured to exculpate himself. *Held*, that the statement was not evidence against the other prisoners under sec. 30, for it was not a confession, as it did not amount to any admission by the prisoner making the statement, that he was guilty in any degree of the offence charged; but was simply an endeavour on his part to explain his own presence on the occasion, in such a manner as to exculpate himself—*Noor Bux Kazi v. The Empress*, I. L. R. 6 Cal. 279.

(g). If an accused person admits that he witnessed the perpetration of a crime, but denies having participated in it, and alleges that he protested against it, such a statement is not a confession within the meaning of this section—*Empress v. Jagrup*, I. L. R. 7 All. 646.

(h). To render the statement of one person jointly tried with another for the same offence liable to consideration against that other, it is necessary that it should amount to a distinct confession of the offence charged—*Empress v. Daji Warsa and Govind Natha*, I. L. R. 6 Bom. 288.

(i). The confession of a person who says he abetted a murder, but withdrew before the actual perpetration of that murder by his associates, cannot be used as evidence against those associates, though the person confessing is tried with them jointly on a charge of murder—*Reg. v. Amirta Govinda*, 10 Bom. H. C. R. 497.

**Corroboration necessary for conviction.**—(a). Confessions of persons tried jointly for the same offence may be 'considered' as against other parties then on their trial with them, but such confessions, when used as evidence against others, stand themselves in need of corroboration, and cannot be used to corroborate other evidence against parties not making confessions; tainted evidence is not made better by being in quantity doubled—*The Queen v. Jaffir Ali and others*, 19 W. R. Cr. 57.

(b). A conviction of a person who is tried jointly with other persons for the same offence cannot proceed merely upon the uncorroborated confession of one of such other persons—*Queen-Empress v. Dosa Jiva*, I. L. R. 10 Bom. 231.

(c). When the accused was convicted solely on the confessions of his fellow-prisoners, who were tried jointly with him for the same offence, *held*, that the conviction was *bad*, such confessions not being evidence within the definition given in sec. 3, and not being sufficient to form the basis of a conviction—*Queen-Empress v. Khandia bin Pandu*, I. L. R. 15 Bom. 66.

(d). A confession made by a co-defendant is not sufficient to support a conviction, even if corroborated by circumstantial evidence, unless the circumstances constituting corroboration would, if believed to exist, themselves support a conviction. *Vide* the observations of Jackson and McDonnell JJ., in the case of *Empress v. Ashootosh Chuckerbutty*, I. L. R. 4 Cal. 483.

(e). A conviction of a person who is being tried together with other persons for the same offence cannot proceed merely on an uncorroborated statement or the confession of one of such other persons—*Empress v. Bhawani and another*, I. L. R. 1 All. 664; see also (1) *Empress v. Ram Chand*, I. L. R. 1 All. 675; (2) *Queen v. Naga*, 23 W. R. Cr. 24; (3) *Reg. v. Ambigara Halaga*, I. L. R. 1 Mad. 163.

31. Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained.

Admissions not  
conclusive proof,  
but may estop.

As to admissions *vide* sec. 17, *ante*.

For the provisions as to estoppels refer to secs. 115-117, *post*.

**Effect of Admissions.**—It is the policy of law to favour the investigation of truth by all expedient means. It is therefore a general doctrine that a party is at liberty to prove that an admission made



by him was mistaken or untrue and he is not estopped by it, unless another person has been induced thereby to act upon it or to alter his condition.\* The doctrine of estoppel by which further investigation is precluded, being an exception to the general rule and being adopted only for the sake of general convenience and for the prevention of fraud, is not to be extended beyond the reason on which it is founded. A statement made by a party is not *ipso facto* conclusive against him, though it may be used against him and may be evidence more or less weighty, possibly even conclusive, according to the circumstances of each case and the result come to by judicial investigation.

**Instances of Admissions not operating as Estoppels.**—(a). It is open to a mortgagor to deny that the money, the receipt of which is formally acknowledged under his hand and seal, was advanced, and to cut it down to a nominal sum or nothing and that being so there was nothing whatever to prevent the defendant from showing the real truth of the transaction—*Ram Saran Singh v. Mussamat Pran Peari*, 13 Moo. L. A. 551.

(b). Defendants who have represented the fact of an adoption, which they erroneously conclude to be an adoption valid in law, can not be charged with misrepresentation so far as the fact is concerned, and are not estopped from setting up the true facts of the case—*Gopilol v. Mussamat Sree Chundrales Buhojee*, 19 W. R. (P. C.) 12.

(c). The circumstance of a party having in a previous suit admitted the execution of a deed, does not preclude him from contesting its validity and maintaining that it was colorable, not real. See *Mussamat Ushrafoonissa Begum v. Babu Gridhari Lal*, 19 W. R. 118.

(d). Where the Lower Appellate Court did not allow a defendant in the present suit to deny the truth of admissions made by her in a former case, or to adduce evidence of her own falsehood and deceit, it was deemed to have acted in opposition to the ruling of the Privy Council in a case in which a statement previously put forward in a Court of justice with a view to defeat the claim of the plaintiff was held to be no estoppel to the party's showing the real truth of the transaction. Even where the object of a benami transaction is to obtain a shield against a creditor, the parties are not precluded from showing that it was not intended that the property should pass by the instrument creating the benami, and that, in truth, it still remained with the person who professed to part with it—*Srematty Dabia Chowdhraïn v. Bimola Sundari Dabi*, 21 W. R. 422.

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\* *Brajendro Kumar Rai Chowdhary v. The Chairman of Dacca Municipality*, 21 W. R. 223.

(e). A party claiming under another, who has made admissions to a transaction to which that other was a party, is at liberty to allege and prove that the admissions were made with a fraudulent purpose and were not true, and to show the real nature of the transaction—*Sreenath Roy v. Bindoo Bashiny Dabi*, 20 W. R. 112.

(f). If the defendants in a boundary suit accepted in a former suit a particular map as correct, their acceptance is legal, though not conclusive evidence against them in the boundary suit, and is tantamount to an admission and stands upon a different footing from the decree in the first suit—*Gordon Stuart & Co. v. Bejoy Gorind Chowdhary*, 8 W. R. 291.

(g). An admission in a previous suit as to the identity of certain lands, though not allowed the effect of an estoppel, was held to cast upon the person who made it, the burden of showing that what was then deliberately asserted, was not the fact—*Forbes v. Mir Mahomed Tuki*, 5 B. L. R. 540.

(h). An admission before the Registrar of the receipt of purchase-money, attested by his endorsement, though evidence of the strongest and most reliable description, ought not to be treated as conclusive—*Mahomed Haneef Meajee v. Mozhur Ali*, 15 W. R. 280.

**The whole Admission to be considered.**—Upon this point refer to the following cases :—

- (1). *Jadunath Rai v. Baroda Kant Rai*, 22 W. R. 220.
- (2). *Niamatullah Khadim v. Himmat Ali Khaddim*, 22 W. R. 519.
- (3). *Tariny Prausad Sen v. Dwarkanath Rakshit*, 15 W. R. 451.
- (4). *Nilmony Sing Deo v. Ramanugraha Rai*, 7 W. R. 29.
- (5). *Pulin Behari Sen v. Watson & Co.*, (F. B.) 9 W. R. 190.
- (6). *Radha Charn Chowdhari v. Chundra Mani Sikdar*, 9 W. R. 290.
- (7). *Bycanta Nath Kumar v. Chundra Mohan Chowdhary*, 10 W. R. 190.

**Non-traverse.**—A written statement is not a pleading in confession and avoidance by which the defendant is bound by the confession and so compelled to prove the avoidance. If used against him, as it may be used, the whole statement must be taken together.

(a). The mere fact of non-traverse of the plaintiff's allegation does not amount to an admission of his title, especially in a case where there is a general denial of the plaintiff's allegation which included

that of the plaintiff's title—*Sheikh Hamidoollah v. Genda-Lall*, 17 W. R. 171.

(b). The system of procedure in this country is not such that if a defendant fails to dispute or contest a point he thereby admits it—*Bhobun Chundra Shome v. Ram Dayal Samonto*, 14 W. R. 56.

(c). The strict rule that averments not traversed must be taken to be admitted, is not applicable to the Indian Courts—*Anundmoyee Chowdhraïn v. Shib Chunder Roy*, 2 W. R. (P. C.) 19.

(d). Their Lordships of the Privy Council held in the case of *Amritalol Bose v. Rajani Kant Mitra*, 23 W. R. 214, that the effect given in the Common Law Courts of England to admissions or the pleadings has always been greater than that given to admissions in the less technical pleadings in the Courts in India.

(e). Where plaintiff's claim on an alleged title, and their allegation, is not traversed by the defendant, their position requires no further proof—*Chundee Charn v. Mobarack Ali*, 12 W. R. 469. This case followed the English rule as to pleadings. In the case of *Ahmadi Begam v. Debi Prasaud*, (18 W. R. 286) it was held that averments upon which no issue is framed, should be taken to be admitted.

### *Statements by Persons who cannot be called as Witnesses.*

32. Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases :—

Cases in which statement of relevant fact by person who is dead or cannot be found, &c., is relevant.

(1). When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's

When it relates to cause of death ;

death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

(2). When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce written or signed by him; or of the date of a letter or other document, usually dated, written or signed by him.

(3). When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.

(4). When the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen.

(5). When the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

(6). When the statement relates to the existence of any relationship by blood, marriage or adoption between persons deceased, and is made in any will or deed relating to family affairs ; relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.

(7). When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in section thirteen, clause (a).

(8). When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

### *Illustrations.*

(a). The question is, whether A was murdered by B : or A died of injuries received in a transaction in the course of which she was ravished. The question is, whether she was ravished by

B; or the question is, whether A was killed by B under such circumstances that a suit would lie against B by A's widow. Statements made by A as to the cause of his or her death, referring respectively to the murder, the rape, and the actionable wrong under consideration, are relevant facts.

(b). The question is as to the date of A's birth. An entry in the diary of a deceased surgeon, regularly kept in the course of business, stating that, on a given day he attended A's mother and delivered her of a son, is a relevant fact.

(c). The question is, whether A was in Calcutta on a given day. A statement in the diary of a deceased solicitor, regularly kept in the course of business, that, on a given day, the solicitor attended A at a place mentioned, in Calcutta, for the purpose of conferring with him upon specified business, is a relevant fact.

(d). The question is, whether a ship sailed from Bombay harbour on a given day. A letter written by a deceased member of merchant's firm by which she was chartered, to their correspondents in London to whom the cargo was consigned, stating that the ship sailed on a given day from Bombay harbour, is a relevant fact.

(e). The question is, whether rent was paid to A for certain land. A letter from A's deceased agent to A, saying that he had received the rent on A's account and held it at A's orders, is a relevant fact.

(f). The question is, whether A and B were legally married. The statement of a deceased clergyman that he married them under such circumstances that the celebration would be a crime, is relevant.

(g). The question is, whether A, a person who cannot be found, wrote a letter on a certain day. The fact that a letter written by him is dated on that day, is relevant.

(h). The question is, what was the cause of the wreck of a ship. A protest made by the Captain, whose attendance cannot be procured, is a relevant fact.

(i). The question is, whether a given road is a public way. A statement by A, a deceased headman of the village, that the road was public, is a relevant fact.

(j). The question is, what was the price of grain on a certain day in a particular market. A statement of the price, made by a deceased banya in the ordinary course of his business, is a relevant fact.

(k). The question is, whether A, who is dead, was the father of B. A statement by A that B was his son, is a relevant fact.

(l). The question is, what was the date of the birth of A. A letter from A's deceased father to a friend, announcing the birth of A on a given day, is a relevant fact.

(m). The question is, whether, and when, A and B were married. An entry in a memorandum book by C, the deceased father of B, of his daughter's marriage with A on a given date, is a relevant fact.

(n). A sues B for a libel expressed in a painted caricature exposed in a shop window. The question is as to the similarity of the caricature and its libellous character. The remarks of a crowd of spectators on these points may be proved.

**Reason of the Rule.**—The general rule of law is that no statement made by persons who are not called as witnesses is admissible in evidence. But in the case of statements made by persons who are dead or otherwise incapacitated from being called as witnesses, the law, under certain circumstances, dispenses with direct oral evidence of the fact, and with the safeguards for truth provided by cross-examination and the sanctity of an oath, and allows the statements to become evidence, as in the cases in question, no better evidence is to be had and as the probability of such statements being true depends upon other safeguards. Secs. 32 to 39 contain elaborate provisions as to particular classes of statements which are exceptions to the general rules as to irrelevancy, and it will be found, on careful examination, that in almost, if not in all the cases where the rule has been relaxed, the derivative evidence received is guarded by some security which renders it more trustworthy than derivative evidence in general.

**Verbal Statements.**—In a trial upon a charge of murder, it appeared that the deceased shortly before her death was questioned

by various persons as to the circumstances in which the injuries had been inflicted on her ; that she was at that time unable to speak, but was conscious and able to make signs. Evidence was offered by the prosecution, and admitted by the Sessions Judge, to prove the questions put to the accused and the signs made by her in answer to such questions. *Held*, by the Full Bench (Mahmood J. dissenting) that the questions and the signs taken together might properly be regarded as "verbal statements" made by a person as to the cause of her death within the meaning of this section, and were therefore admissible in evidence—*Queen-Empress v. Abdullah*, I. L. R. 7 All. 385. Sir Comer Petheram C. J., in delivering the judgment of the Full Bench, said :— "The question then arises—Is the statement a verbal one? 'Verbal' means by words. It is not necessary that the words should be spoken. If the term used in the section were 'oral,' it might be that the statement must be confined to words spoken by the mouth. But the meaning of 'verbal' is something wider." Mahmood J. refused to accept the interpretation given by the learned Chief Justice as correct and expressed his dissent by saying that—"to me *verbal* cannot mean more than 'by means of a word or words.' Nodding the head or waiving the hand is not a word." The word 'verbal' is derived from the Latin word *verbum*, and means 'expressed in words.' 'Word' includes a signal ; consequently Mahmood J. was not quite right in saying that nodding the head or waiving the hand is not a word.

**Incapable of giving evidence.**—The words 'incapable of giving evidence' denote an incapacity of a permanent, not of a temporary kind. The allocation in the section of the words with the other conditions of an absolute and permanent character, *viz.*, that the witness is dead or cannot be found, confirms the view, and a still further confirmation is found in the fact that the last clause of the section seems expressly intended to meet the case of temporary incapacity, it being left to the discretion of the Court to determine whether the delay and expense consequent upon an adjournment for the purpose of procuring the presence of the witness, are likely to be so great that it would be unreasonable to incur them—*In re Pyari Lal*, 4 C. L. R. 504. This case has been doubted by their Lordships who decided the case of *Asgur Hossein*, 8 C. L. R. 124. Their Lordships said :—"We are inclined to think on the construction of the entire section and from reference also to sec. 32 which precedes it that something short of permanent incapacity might satisfy the words of the section, 'incapable of giving evidence.'"

**Clause 1.—Dying declarations.**—In order to render a dying declaration admissible in evidence, the law of England makes it necessary



that the declarant should have been in *actual danger of death*, that he should have been *aware of this danger*, and that *death should have ensued*. It also lays down that evidence of this description is admissible in no civil case, and in criminal cases only in the single instance of homicide, where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declaration. Under the Indian Evidence Act, statements made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, are relevant, whatever may be the nature of the proceedings in which the cause of the death of the person who made the statement comes into question and whether the person who made it was or was not, at the time when it was made, under expectation of death.

The form of declaration is immaterial ; but if it be in writing, it must, if existing, be produced. The declaration may be made by signs, or any other method of expressing thought. It is immaterial that the declaration is made in answer to questions which are objectionable as leading. But it is necessary that the declarant must have been competent to testify to the declaration if alive. Hence the dying declarations of a child of tender years will be rejected, unless it appears that he was competent to understand questions put to him and to give rational answers. Declarations of persons who are prevented from understanding the questions put to them, or from giving rational answers by extreme old age, disease, or any other cause of the same kind, are also inadmissible.

The declarant may be impeached or discredited in any way that a witness may be impeached.

(a). In a case of murder, the statement made by the deceased in the presence of his neighbours and of a head-constable was admitted as relevant evidence under this clause, as it provides that such statement is relevant whether the person who made the statement was or was not, at the time when it was made, under expectation of death—*The Queen v. Degumber Thakoor*, 19 W. R. Cr. 44.

(b). A statement by the deceased that he had been beaten by the accused is admissible in evidence without proof that at the time of making the statement the deceased was conscious of any fatal effect of such beating—*Empress v. Blechynden*, 6 C. L. R. 278.

(c). A statement made by a dying person as to the cause of his death, and recorded by a Magistrate, cannot be treated as a deposition unless made in the presence of the accused before the Magistrate exercising judicial jurisdiction, but must be proved in the ordinary way by a person who heard it made—*In the matter of Sumiraddin*, 10 C. L. R. 11.

(d). The declaration of a dying person albeit made on solemn affirmation before a Magistrate, who was not, however, the Committing Magistrate, and signed by him, is not admissible in evidence without legal proof that the deceased made such a declaration—*Reg. v. Fala Adaji*, 11 Bom. H. C. R. 247.

(e). In the proceedings before a Magistrate on a charge of causing grievous hurt, two (among other) witnesses, one of whom was the person assaulted, were examined on behalf of the prosecution. The prisoners were committed for trial. Subsequently the person assaulted died in consequence of the injuries inflicted on him. At the trial before the Sessions Judge, charges of murder and of culpable homicide not amounting to murder, were added to the charge of grievous hurt. The deposition of the deceased witness was put in and read at the sessions trial. *Held*, that the evidence was admissible either under this clause or sec. 33, notwithstanding the additional charges before the Sessions Court—*The Empress v. Rochia Mohato*, I. L. R. 7 Cal. 42.

**Informative character of the evidence of dying declarations.**—Though dying declarations, when deliberately made under a solemn and religious sense of impending dissolution, and concerning circumstances wherein the deceased was not likely to be mistaken, are entitled to great weight if precisely identified, yet it is always to be recollected that the accused has not the power of cross-examination—a power quite as essential to the eliciting of all the truth as the obligation of an oath can be—and that, where a witness has not a deep sense of accountability to his Maker and an enlightened conscience, the passion of anger and the feelings of revenge, or, in the case of mutual conflict, the natural desire of screening his own misconduct, may affect the truth and accuracy of his statements, and give a colour to the transaction which, had further investigation been attainable, might have been proved to be incorrect. Moreover, the particulars of the violence to which the deceased had spoken are likely to have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed, and leading both to mistakes as to the identity of persons and to the omission of facts essentially important to the completeness and truth of the narrative—*Jackson v. Kniffen*, 2 John 35 ; 1 Green 156 ; *R. v. Ashton*, 2 Lew. C. C. 147. In estimating the *weight* to be given to dying declarations in particular cases, the following circumstances, mentioned by Mr. Taylor should be borne in mind : 1st—The danger of perjury in fabricating declarations, the truth or falsehood of which it is impossible to ascertain ; 2nd—The danger of letting in incomplete statements which, though true

as far as they go, do not constitute the whole truth ; 3rd—The experienced fact that implicit reliance cannot in all cases be placed upon the declarations of a dying person : for his body may have survived the powers of his mind ; or his recollection, if his senses are not impaired, may not be perfect ; or for the sake of ease, and to be rid of the importunity of those around him, he may say or seem to say whatever they choose to suggest.

The following observations of Mr. Field are entitled to great weight :—"The caution with which this kind of testimony should be received has often been commented upon. The test of cross-examination may be wholly wanting ; and as remarked by Mr. Phillips, the particulars of the violence may have occurred under circumstances of confusion and surprise, calculated to prevent their being accurately observed. The consequence also of the violence may occasion an injury to the mind and an indistinctness of memory as to the particular transaction. The deceased may have stated his *inferences*; from facts, concerning which he may have drawn a wrong conclusion, or he may have omitted important particulars, from not having his attention called to them. Any one who has ever taken down the statement of an illiterate man suffering from severe injuries will fully realise the truth of these remarks. The deponent, at no time very competent to draw a clear distinction between knowledge obtained through the medium of his own senses, and that which he has heard or imagined, is less than ever able to discriminate when distracted and enfeebled by physical suffering. Falsehood must also be guarded against, and this more especially in India. I have, in the course of my experience, met several cases which strongly impressed me with the necessity of exercising the greatest possible care and discrimination in estimating the value to be assigned to this kind of evidence, and in more than one instance, I have known a statement made by a person who did not expect to live many hours, turn out to be wholly and utterly untrue."—Field's Evidence, 5th Ed. 174.

**Clause 2.—Accounts and Entries.**—This clause simply requires that entries in accounts should, in order to be relevant, be regularly kept in the course of business : and although it may, no doubt, be important to show that the person making or dictating the entries had, or had not, a personal knowledge of the facts stated, this is a question which affects the value, not the admissibility of the entries.\* The entries need not be made *contemporaneously with the facts which they relate*, to be admissible in evidence, as is required by the law of

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\* *Vide Reg. v. Hanumanta*, I. L. R. 1 Bom. 510.

England. But the weight of the evidence will depend upon the consideration, how far the statement or entry was contemporaneous with the fact which it relates. If the statement or entry, sought to be proved, relates to a relevant fact, it would be admissible whether it be connected with the performance of a duty or be merely an independent collateral matter.

**Reason of the Rule.**—In the absence of all suspicion of sinister motives, a fair presumption arises from a consideration of the following circumstances, that entries made in the ordinary course of business are correct: *1st*—It is easier, considering the trouble which the process of invention implies, to state what is true than what is false; *2nd*—Such entries usually form a link in a chain of circumstances which mutually corroborate each other; *3rd*—False entries would be likely to bring clerks into disgrace with their employers; *4th*—Most of such entries are subject to the inspection of several persons, and an error would be exposed to speedy discovery; *5th*—As the facts to which they relate are generally known but to few persons, a relaxation of the strict rules of evidence in favour of such entries may often prove convenient, if not necessary for the due investigation of truth.\* But before such statements can be admitted, it must be proved that the person who made them is dead, or cannot be found, or has become incapable of giving evidence, or that his attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable; and the burden of proving this is on the person on whose behalf such evidence is sought to be given.

**Accounts under what circumstances admissible.**—To render accounts admissible as the declarations of a deceased person charging himself, it is not necessary that they should be in his handwriting, and should bear his signature; but they will be received in evidence, if they were written by him either wholly or in part, though they were not signed; or if they were signed by him, though they were written by a stranger. Neither can any objection be raised to their admission, though they were neither written nor signed by the deceased, if either direct proof can be furnished that they were written by his authorized agent, or if that fact can be indirectly established, as for instance, by showing that the deceased subsequently adopted the accounts as his own, and delivered them in, at an audit; nor does it signify in such a case, whether the party who actually wrote the accounts be alive or dead at the time of the trial, though in the former event his non-production may be matter of observation to the jury. But if no proof can

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\* *Vide Poole v. Dicus*, 1 Bing. N. C. 649.

be given that the account was either written or signed, or authorized or adopted, by the deceased person made chargeable thereby, it cannot be received.—Taylor, sec. 682.

(a). In this case the prosecution relied upon certain account books which were kept in the following manner : When any wood, received from Alibagh, was to be sold, a servant of the broker, named Khemji, went to the bunder and made a memorandum of the quantity weighed and sold. He states that he did not necessarily see the weighing, but that the quantity of wood was certified to him by the weigher, by an agent of the contractor, and by the purchaser. The memorandum so made was taken by Khemji in the evening to the broker's shop, and an entry was then made in the broker's accounts by his clerk Amuluk. The Sessions Judge rejected the accounts as they were not made by, nor at the dictation of, a person who had a personal knowledge of the truth of the facts stated. Their Lordships of the High Court said, that no doubt the English rule would exclude such evidence but "the Indian rule of evidence (Evidence Act, sec. 32, cl. 2, and sec. 34) simply requires that entries in accounts should, in order to be relevant, be regularly kept in the course of business ; and although it may be no doubt important to show that the person making or dictating the entries had, or had not, a personal knowledge of the facts stated, this is a question which, according to the Indian rule of evidence, affects the value, not the admissibility of the entries. In the present instance it appears to us that Ladak Haji's accounts were regularly kept in the course of business, when a clerk sitting in a Bombay office keeps accounts of transactions effected at the bunders or the Cotton Green, he must necessarily make the entries, not from his personal knowledge, but from information supplied to him by some other person. The rule adopted by the Sessions Judge would exclude the accounts of half the merchants in Bombay. We have no doubt that Ladak Haji's accounts are admissible in evidence."—*Reg. v. Hanumanta*, I. L. R. 1 Bom. 610.

(b). Books of a deceased incumbent, rector or vicar, containing receipts and payments by him relative to the living, have been held receivable in evidence for his successors—*Young v. The Master of Clure Hall*, 17 Q. B. 529.

(c). A register of marriages kept by the Istahad, since deceased, who celebrated the marriage in question, in which register was entered the amount of the dower, was held to be admissible and relevant, as evidence of the sum fixed, being an entry in a book kept in the discharge of duty within cl. (2) of this section—*Takeri Begum v. Sakina Begum*, I. L. R. 19 Cal. 689 (P. C.)

(d). A deed of conveyance was tendered in evidence which purported to bear the mark of G, as vendor, and which was duly attested by four witnesses. G, however, denied that she had ever executed the deed, and said that the mark was not hers. All the attesting witnesses were dead. A witness was called who knew the handwriting of one of the attesting witnesses, and who swore that the signature of that witness to the attestation clause of the deed was genuine. *Held*, on the authority of *Whitelocks v. Musgrave*, 2 Cr. and M. 511, that the deed was admissible in evidence, the execution of G, being sufficiently proved—*Abdullah Paru v. Gannibai*, I. L. R. 11 Bom. 690.

(e). In the case of *Price v. The Earl of Torrington*, 1 Smith's Leading Cases 277, the plaintiff, a brewer, brought an action against the Earl of Torrington for beer sold and delivered, and the evidence given to charge the defendant was this, that the way of the plaintiff's dealing was, that the draymen came every night to the clerk of the brew-house and gave him an account of the beer they had delivered out, which he set down in a book kept for that purpose, *to which the draymen set their names*, and that the drayman was dead, but this was his hand set to the book; and *this was held good evidence of a delivery; otherwise of the shopbook itself singly without more.*

(f). The entry by a deceased solicitor in his diary of his having attended a client on a certain day on her executing a deed of appointment, was held sufficient evidence of the due execution of the deed—*Rawtins v. Richards*, 28 Beavan's Rep. 370.

(g). In the case of *Queen v. Tarini Charan De*, 9 B. L. R. App. 42, the prisoner was charged with forging a railway bill of lading, and was tried at Calcutta. It was proposed to put in a letter from the consignor of Delhi to his partner in Calcutta advising the despatch of the goods; but it was held that such a letter was not a document used in commerce, &c., within the meaning of this section, and consequently inadmissible.

**Clause 3.—Reason of the Rule.**—This clause does not require that the statements herein mentioned, in order to be admissible in evidence, should be contemporaneous with the facts to which they relate. Statements which are admissible under this clause are evidence not only against the persons making them and their privies but against strangers also. The rule that declarations made by persons against their pecuniary or proprietary interest are evidence, is based upon the consideration that it is extremely improbable that such declarations should be false. The regard which men usually pay to their own

interest is considered a sufficient security against any wilful misstatement, and affords a reasonable inference that the declarations or entries were made under any mistake of fact or want of information on the part of the declarant. The danger of any fraud in the statement will be still less dreaded if we reflect that evidence is not receivable till after the death of the declarant and that, if the opponent can show that the statement was made with any sinister motive, it will at once be rejected. The ordinary test of truth afforded by the administration of an oath and by cross-examination are certainly here wanting, but their place is in some measure supplied by the circumstances of the declarant; and the inconveniences that would result from the exclusion of evidence having such guarantees for its accuracy in fact, and its freedom from fraud are rightly considered much greater in general than any which are likely to be experienced from its admission.\*

**Interest.**—The interest to which the statement must be opposed, in order to be relevant, may be one of four kinds; 1st—Pecuniary; 2nd—Proprietary; 3rd—Interest in escaping a criminal prosecution; 4th—Interest in escaping a suit for damages.

**Pecuniary interest.**—A declaration may be against the pecuniary interest of the person who makes it, if part of it charges him with a liability, though other parts of the book or document in which it occurs may discharge him from such liability in whole or in part, and [it seems] though there may be no proof other than the statement itself either of such liability or of its discharge in whole or in part.—Stephen's Digest, art. 28. Such declarations must be made while owning the interest. In general, it is sufficient if the declaration be *prima facie* against the interest of the declarant; the declaration is admissible, though in certain contingencies it may enure to his direct advantage.

**Statements exposing to criminal prosecution.**—In the Sussex Peerage Case (11 Clark and Finnelly Reports, House of Lords, 103) Lord Brougham remarked: "To say, if a man should confess a felony for which he would be liable to prosecution, that therefore the instant the grave closes over him, all that was said by him is to be taken as evidence in every action and prosecution against another person, is one of the most monstrous and untenable propositions that can be advanced." But our Evidence Act makes such statement admissible in evidence.

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\* Vide *Phillips v. Cole*, 10 A. and B. 106.

A *Varaspatra* (deed of heirship) was executed in 1847 by A, a Hindu widow, in favour of B. Under this *Varaspatra*, B took possession of the property mentioned therein, and employed it during his lifetime. C, the minor son of B, filed in a suit the *Varaspatra* in support of his title; *held*, that the *Varaspatra* was admissible under this clause, as it was manifestly a declaration by A against her proprietary interest; for by it she divested herself of her widow's estate in the property, and there being no evidence of her existence after 1847, she must be presumed to have been dead in 1881, when the suit was filed—*Harichintaman Dikshit v. Moro Lashman*, I. L. R. 11 Bom. 89.

**Clause 4.—The reason of the Rule.**—The origin of the rights is usually of so ancient a date, and the rights claimed are of so undefined and general a character, that direct proof of their existence and nature can seldom be obtained and ought not to be required. In matters in which the community are interested, all persons must be deemed conversant. As common rights are naturally talked of in public, and as the nature of such rights excludes the possibility of individual bias, what is dropped in conversation respecting them may be presumed to be true. For the general interest which belongs to the subject would lead to immediate contradiction from others, if the statements proved were false. Reputation can hardly exist without the concurrence of many parties unconnected with each other, who are all alike interested in investigating the subject. Such concurrence furnishes strong presumptive evidence of truths. Now it is obvious that rights of public or general interest which are supposed to have been exercised in times past, partake in some degree of the nature of historical facts, and especially in this, that it is rarely possible to obtain original proof of them. The law accordingly allows them to be proved by general reputation, *e.g.*, by the declarations of deceased persons who may be presumed to have had competent knowledge on the subject; by old documents of various kinds, which, under ordinary circumstances, would be rejected for want of originality, &c. But, in order to guard against fraud, it is an established principle that such declarations, &c., must have been made *ante litem motam*, an expression which seems to mean, before any *controversy* has arisen on the subject to which the declarations relate, whether such controversy has or has not been made the subject of a lawsuit. The value of this species of evidence manifestly depends on the degree of publicity of the matters in question; and also, when in a documentary shape, on the facilities or opportunities which may exist for substitution or fabrication.—*Best*, 8th Ed., 436.



**To what such evidence should be confined.**—In cases of general rights which depend upon immemorial usage, living witnesses can only speak of their own knowledge to what passed in their own time ; and to supply the deficiency, the law receives the declarations of persons who are dead. There, however, the witness is only allowed to speak to what he has heard the dead man say respecting the reputation of the right of way, or of common, or the like. A declaration with regard to a particular fact, which would support or negative the right, is inadmissible. *Vide* the remarks of Sir J. Mansfield in the *Berkeley Peerage Case*, 4 Campbell's Reports, 415.

From the above it would appear that the qualifications for a statement to be admissible under this clause are : 1st—That the statement must relate to general facts and not to particular facts, 2nd—That the person making the statement was likely to be acquainted with the public or general right ; 3rd—That the statement was made *anti litem motam*, i.e., before the controversy arose.

**Extent of the relaxation of the rule that hearsay evidence is inadmissible.**—The Law of England lays down the rule that, on the trial of issues of fact before a jury, hearsay evidence is to be excluded, as the jury might often be misled by it ; but makes exceptions where a relaxation of the rule tends to the due investigation of truth and the attainment of justice. One of these exceptions is where the question relates to matters of public or general interest. The term 'interest' here does not mean that which is 'interesting' from gratifying curiosity or a love of information or amusement, but that in which a class of the community have a pecuniary interest or some interest by which their legal rights or liabilities are affected. The admissibility of the declarations of deceased persons in such cases is sanctioned, because these rights and liabilities are generally of ancient and obscure origin, and may be acted upon only at distant intervals of time ; because direct proof of their existence ought not to be required ; because in local matters in which the community are interested all persons living in the neighbourhood are likely to be conversant ; because common rights and liabilities being naturally talked of in public, what is dropped in conversation respecting them may be presumed to be true ; because conflicting interests would lead to contradiction from others if the statements were false ; and thus a trustworthy *reputation* may arise from the concurrence of many parties unconnected with each other, who are all interested in investigating the subject. But the relaxation has not been, and ought not to be, extended to questions relating to matters of mere private interest, for respecting these direct proof may be given, and no trustworthy reputation is likely to arise. We must

remark, however, that although a private interest should be involved with a matter of public interest, the reputation respecting rights and liabilities affecting classes of the community cannot be excluded, or this relaxation of the rule against the admission of hearsay evidence would often be found unavailing—*R. v. Inhabitants of Bedfordshire*, 4 E. and B. 535.

**Public.**—The term ‘public’ applies to that which concerns every member of the state or community. ‘A right is public if it is common to all Her Majesty’s subjects, and declarations as to public rights are relevant whoever made them.’—Stephen’s Digest, art. 30.

**General.**—The term ‘general’ is limited to a lesser though still a considerable portion of the community, as for example, to the persons living in a particular district or neighbourhood. “A right or custom is general if it is common to any considerable number of persons, as the inhabitants of a parish, or the tenants of a manor.”—Stephen’s Digest, art. 30.

**Examples of matters of public and general interest.**—Mr. Norton gives the following examples : (a) a boundary between villages ; (b) the limits of a village or town ; (c) a right to collect tolls on a public road ; (d) a right claimed by a corporation to trade to the exclusion of others ; (e) a right to pasturage of waste lands ; (f) liability to repair roads or plant trees ; (g) right to watercourses tanks and ghâts for washing ; (h) rights of common and the like.

**Before Controversy.**—The statement, in order to be relevant must have been made before any controversy as to such right, custom or matter had arisen. The commencement of the controversy does not mean the commencement of the suit, but the commencement of that dispute which has ultimately led to the litigation. Where there is no controversy, there is no reasonable probability of bias or other inducement to warp the truth. But no man remains indifferent in regard to matters in actual controversy, for when the contest has begun, people generally take part on the one side or the other, their minds are in a ferment ; and if they be disposed to speak the truth, facts are seen by them through a false medium. To avoid, therefore, the mischief which would otherwise result, all *ex parte* declarations, even those upon oath, are rejected, if they can be referred to a date subsequent to the beginning of the controversy.”—Taylor, sec. 628. But the mere fact of there being a controversy between the parties will not have the effect of excluding subsequent statements, the controversy must have been as to the right or custom or matter under inquiry. Nor will such a statement be inadmissible on the ground that it was made with a view to avoid future controversy ;

or with the direct intention of supporting the declarant's title, or because the declarant stood, or believed that he stood in the same legal position as the person by whom the statement is adduced.—Taylor, sec. 630.

**Declarations as to general rights.**—Declarations as to general rights are deemed to be relevant only when they were made by persons who are shown to the satisfaction of the Judge, or who appear from the circumstances of their statement, to have had competent means of knowledge.—Stephen's Digest, art. 30.

**Likely to be aware.**—It contemplates statements made by persons possessing sufficient opportunities for knowledge and for correction by conflicting discussion, *i.e.*, in case of public interest, persons who are members of the public, and in case of general interest, persons who are members of the community among which interest in the question under discussion may be assumed to have been general.

(a). A statement signed by several witnesses to the effect that a widow of the Kadwan Kunbi caste cannot adopt, according to the custom of the caste without the express authority of her husband, was held not admissible under this section, to prove the custom as alleged—*Patel Vandrayan v. Patel Mani Lal Chuni Lal*, I. L. R. 15 Bom. 565.

**Clauses 5 and 6.—The reason of the Rule.**—The rule contained in this clause is an exception to the general rule of law which requires all facts to be proved by direct evidence and is based on the ground of necessity, as a strict enforcement of the ordinary rules of evidence would occasion a failure of justice in the generality of cases. In the *Berkeley Peerage Case*, 4 Campbell's Reports, 415, Sir. J. Mansfield said: "In matters of pedigree, it being impossible to prove by living witnesses the relationships of past generations, the declarations of deceased members of the family are admitted; but here, as the reputation must proceed on *particular facts*, such as marriages, births and the like, from the necessity of the thing, the hearsay of the family as to these particular facts is not excluded. General rights are naturally talked of in the neighbourhood, and the family transactions, among the relations of the parties: Therefore, what is dropped in conversation upon such subjects may be presumed to be true."

**Such declarations when relevant.**—If genealogy or pedigree be a fact in issue or relevant thereto, declarations in any form by deceased members of the family in question, or the deceased husband or wife of any such person, are admissible in evidence to establish the descent, relationship, birth, marriage, or death of other members of

the family, together with the dates, places and other circumstances relating thereto. But such declarations are not admissible to establish pedigree or matters collateral thereto, in cases where pedigree itself is not directly relevant thereto.

**Difference between clauses 5 and 6.**—The differences between cl. 5 and cl. 6 are the following: 1st—Cl. 5 relates to statements relating to the existence of any relationship between persons, *alive or dead*, whereas cl. 6 relates to the existence of relationship between *deceased persons only*. In relation to *persons*, cl. 5 is more wide in its application than cl. 6; 2nd—Cl. 5 imposes the restriction that the person making the statement should have *special means of knowledge*, whereas cl. 6 imposes no such restriction but enjoins that the statement must be *contained in a will or deed relating to the affairs of the family to which any such deceased person belonged, or in a family pedigree, or upon a tombstone, family portrait, or other thing on which such statements are usually made*. But both statements have one point of similarity. They should, in order to be relevant, have been made *before the question in dispute was raised*.

**Rulings.**—(a). The judgment of an Appellate Court, reversing that of a Court of first instance, on a question as to the existence of relationship, rested mainly on a statement recorded in prior settlement—proceedings as made by a person since deceased, who was employed therein as *muktear* by certain members of the family. This judgment was reversed on a second appeal by the Court above on the ground that the statement was inadmissible, not coming within the meaning of this section, as that of a person having special means of knowledge on the question. *Held*, that the statement was *inadmissible*, as it appeared that his only means of knowledge was from his being instructed as such *muktear*, he not having been a member of the family, nor intimately connected with it, nor having had any special means of knowing its concerns—*Sangram Singh v. Rajan Bahi and another*, I. L. R. 12 Cal. 219 (P. C.)

(b). Evidence of statements made by a deceased family priest as to the relationship of the members of the family may be given under this clause—*Shamlal Singh v. Radha Bibi and another*, 4 C. L. R. 173.

(c). It does not relate to statements made by interested parties, in denial in the course of litigation, of pedigrees set up by the opposite parties—*Naryan Kuar v. Chundi Din*, I. L. R. 9 All. 467.

(d). A, the son of a deceased zemindar, sued his widow and brother B and C, for possession of the zemindari which was impartible. In order to prove that A was illegitimate, C filed two

petitions, purporting to have been signed and sent to the Collector of the district by C, in 1871, referring to A's mother as a concubine. C was not examined as a witness. *Held*, that their contents were not evidence—*Parvathu v. Thirumala*, I. L. R. 10 Mad. 334.

(e). A deceased person in a draft will in his handwriting, but not signed by him, described a woman C by her maiden name and "as passing as his wife." *Held*, that the document was admissible in evidence on a question of the declarant's marriage with C—*L. R. Lambert's Trusts*, 56 L. J. Ch. 122.

(f). In a suit to recover possession of immoveable property, a horoscope was tendered in evidence by the plaintiff, which the plaintiff said had been given to him by his mother, and had been seen by members of his family, and used on the occasion of his marriage. He was unable to say by whom the horoscope or an endorsement on it had been made. The endorsement purported to state what his age was. *Held*, that the horoscope was not admissible—*Ramnaryan Kallia v. Moni Bibi*, I. L. R. 9 Cal. 613. This case has been followed in *Satis Chunder Mukerjee v. Mohendra Lal Patack*, I. L. R. 17 Cal. 849. Both these cases have been doubted in *Raja Gondan v. Raja Gondan and others*, I. L. R. 17 Mad. 134, in which it was held that the defendants could put in as admission under secs. 17 and 18 a horoscope of the plaintiff.

(g). For the purpose of the decision of a question of limitation it was necessary to prove the date of the plaintiff's birth. The plaintiff and one of his witnesses each spoke to statements made to them by relatives of the plaintiff who were since deceased, relating to the date of the plaintiff's birth. *Held*, that such statements were admissible in evidence under this clause—(*Haines v. Guthree*, L. R. 13 Q. B. D. 818 not followed). *Ram Chundra Dutt v. Jogeswar Narayan Deo*, I. L. R. 20 Cal. 758.

(h). In a suit on a promissory note, to which the only defence was minority, a statement made by the defendant's father (who died before proceedings by way of suit had been contemplated) to a witness as to the age of his son, held to be inadmissible as evidence of the age of the defendant and in support of his defence—*Beepin Behary Daw v. Sreedam Chunder Dey*, I. L. R. 13 Cal. 42. This case was decided on the principle that the rule which admits hearsay evidence in pedigree cases is confined to the proof of the pedigree, and does not apply to proof of the facts which constitute a pedigree, such as birth, death, and marriage, when they have to be proved for other purposes.

(c). The incidental mention of a child's age in the recital of a will was held to be no proof of the exact age of such child—*Nilmont Chowdhary v. Zahirunnessa*, 8 W. R. 371.

**Clause 7.**—This clause does not declare all reputation to be relevant, but that only which consists of statements contained in any deed, will, or other document relating to any transaction by which any right or custom was *created, claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence*. The clause, therefore, does not provide for the admissibility of parol evidence of reputation in the cases to which it applies.—Field, 5th Ed., 196. The effect of this clause is that a recital or other statement of a relevant fact, contained in any document admissible under sec. 13, would be itself relevant, if the party making the statement were dead or non-producible.

(a). In a suit to establish the existence of a family custom, the plaintiffs offered in evidence a deed containing a recital that the custom of the family was as alleged in the plaint, and a covenant to do nothing contrary to it. The deed was executed before action brought by the present plaintiffs, and also by a plaintiff who had died since the institution of the suit, and as the plaintiff alleged, by a 'considerable majority' of the family, but the defendant was not a party to it. *Held*, that the deed was admissible as evidence on behalf of the plaintiffs, though they could themselves be called as witnesses; but that, though admissible, the custom as against the defendant must be proved *aliunde*—*Harronath Mullic v. Nittanund Mullic*, 10 B. L. R. 263.

**Clause 8.**—(a). The meaning of this clause is, that when a number of persons assemble together to give vent to one common statement, which statement expresses the feelings or impressions made in their mind at the time of making it, that statement may be repeated by the witnesses and is evidence. That certainly does not mean that a Police-officer may go round, collect a great number of statements from persons in different places, and afterwards put those statements in second hand before the Court as evidence which may affect the result of a criminal trial—*Vide The Queen v. Ram Dutt Chowdhry*, 23 W. R. Cr. 35.

(b). In the case of *Du Bost v. Beresford*,\* the plaintiff sued the defendant for damages for hacking a picture to pieces, which the plaintiff had exhibited for money. The defendant alleged that the picture was a scandalous libel upon his brother and sister; and in order to show whether the painting was made to represent these persons, the declarations of the spectators, while looking at the picture in the exhibition, were admitted in evidence.

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\* 2 Campbell's Reports, 511.

*Illustrations.*—Illustration (a) applies to cl. 1. Illustrations (b), (c), (d), (g), (h) apply to cl. 2. Illustration (e) applies to cl. 3. Illustrations (i) and (j) apply to cl. 4. Illustrations (f), (k) and (l) apply to cl. 5. Illustration (m) applies to cl. 6. Illustration (n) applies to cl. 8.

33. Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable.

Provided—

That the proceeding was between the same parties or their representatives in interest.

That the adverse party in the first proceeding had the right and opportunity to cross-examine.

That the questions in issue were substantially the same in the first as in the second proceeding.

*Explanation.*—A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

*Scope of the section.*—This section gives the Courts new powers, which require to be exercised with great caution. There is no doubt that it is still necessary (just as much as ever it was) to produce every witness at the trial, unless it is proved to be either actually impossible to produce him, or to be so difficult to do so that it is

under the circumstances, unreasonable to insist on his production.\* Evidence given in a judicial proceeding by a witness, is admissible as evidence in a subsequent judicial proceeding only in the following emergencies :—(i), when the witness is dead ; (ii), when he cannot be found ; (iii), when he is incapable of giving evidence ; (iv), when he is kept out of the way by the adverse party ; and (v), when his presence cannot be obtained without an amount of delay or expense, which, under the circumstances of the case, the Court considers unreasonable.† As the exclusion of such evidence would in many cases result in serious miscarriage of justice, it has been thought advisable to receive it in the emergencies mentioned above : Provided— *1st*, that the proceeding was between the same parties or their representatives in interest ; *2nd*, that the adverse party in the first proceeding had the right and opportunity to cross-examine ; and *3rd*, that the questions in issue were substantially the same in the first as in the second proceeding.

**How to be proved.**—The burden of proving the circumstances which render such evidence admissible, lies on the person who wishes to give it. When proof of evidence given on previous occasions is admissible, it may be proved by the production of the record or a certified copy (sec. 76). Sec. 80 of the Act provides that a document purporting to be a record of evidence shall be presumed to be genuine ; that statements made as to the circumstances under which it was taken shall be presumed to be true, and the evidence to have been duly taken.

**Grounds of Admissibility.**—When the evidence of an absent witness is admitted under this section, the grounds for its admission should be stated fully and clearly, so as to enable the Appellate Courts to judge of the propriety of its admission—*The Queen v. Mowjan*, alias *Nane Khan*, 20 W. R. Cr. 69.

**Dead.**—*Vide* Provisions of secs. 107 and 108, *post*.

**Cannot be found.**—In criminal proceedings, the common law of England does not allow to be admitted the former deposition of a witness, on mere proof that the witness himself cannot be found after diligent search. Neither will it be received, though satisfactory proof be given that the witness was not absent from any intention to defeat justice, but that, being a foreigner, he had, since the prisoner was committed for trial, returned to his own country, and was at the time of the trial resident abroad—*Vide* Taylor, sec. 445.

**Incapable of giving evidence.**—*Vide* notes to sec. 32, *ante*.

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\* *The Queen v. Mowjan*, 20 W. R. Cr. 69.

† *Empress of India v. Mulu*, I. L. R. 2 All. 646.



**Illness.**—When the deposition is sought to be read on the ground of the sickness of the witness, it must, of course, be proved that he is, at the actual time of the trial, too ill to travel; and the Judges, very properly, seem inclined to hold that this fact should be strictly established. Mere proof that the witness was confined to his bed some days before, will not suffice; and as a general rule, it will be prudent, though it is not absolutely necessary, to have the testimony of a medical man.—Taylor, sec. 456.

(a). To bring a case within this section, in order to admit a deposition of a witness alleged to be unable to attend by reason of illness, it is not sufficient that such witness should be stated to be ill and confined to the house, but precise evidence should be required by the Court as to the nature of the illness and the incapacity to attend.—*In re Agar Hossein*, 8 C. L. R. 124.

(b). A suggestion that, owing to the old age and nervousness of the witness, his being examined in Court might be attended with danger, is not a sufficient ground within this section for allowing his deposition to be read.—*Reg. v. Farrell*, 43 L. J. M. C. 94.

(c). If from the nature of the illness or other infirmity no reasonable hope remains that the witness will be able to appear in Court on any future occasion, his deposition is certainly admissible.

**Inconvenience to witness.**—Inconvenience to witnesses is no ground allowed under this section.—*Vide Queen-Empress v. T. Burke*, I. L. R. 6 All. 224.

**Kept out of the way.**—The proposition that, if a witness be kept out of the way by the adversary, his former statements on oath will be admissible, rests chiefly on the broad principle of justice, which will not permit a party to take advantage of his own wrong.

**Unreasonable delay.**—(a). Before a Sessions Judge can admit the depositions of witnesses given in a former judicial proceeding as evidence before him, it ought to appear that the presence of the witnesses could not be obtained without an amount of delay or expense which the Court considers unreasonable; and if there is nothing of a special nature to stand in the way, the case should be adjourned to the next Sessions to procure the attendance of the witnesses.—*The Queen v. Lakhun Santhal*, 21 W. R. Cr. 56. In this case Phear J. observed: "Now, it might very well be that, in the view which the Judge had taken of the case, 'the delay and expense of postponing the trial, in order that the absent witnesses might be able to appear, was a useless delay and expense.' But it does not follow that the delay and expense of bringing the witnesses was, under all the circumstances of the case, unreasonable. The delay could hardly, in a

matter of this kind, where the charge against the prisoner was that of having committed murder, the delay of an adjournment to the next Sessions, could not in itself very well be considered unreasonable for the purpose of enabling the case to be duly tried on *vivâ voce* testimony, and the expense of bringing the witnesses for the prosecution, and any other expense that might be attendant upon this delay, could hardly of itself under the circumstances disclosed to us, be considered unreasonable, unless it is so in almost every case which is tried. The prisoner certainly had a right to expect that the witnesses should be brought to give their testimony *viâ voce* before the Sessions Court, and any expense or delay that might be necessary for that purpose must, in the absence of special facts, be taken as reasonable rather than unreasonable.

See also *Queen-Empress v. A. M. Jacob*, I. L. R. 19 Cal. 113.

(b). The provisions as to admitting previous depositions of witnesses on the ground of unreasonable delay or expense, should be sparingly applied, and certainly not in a case where the witness is alive, and his evidence reasonably procurable. It is only in extreme cases of expense or delay that the personal attendance of a witness should be dispensed with—Vide *Empress of India v. Mulu*, I. L. R. 2 All. 646.

(This ruling follows *Queen v. Belat Ali*, 19 W. R. Cr. 67 and *Empress v. Ganraj*, I. L. R. 2 All. 444).

(c). A Court of Session is not at liberty to treat a deposition sent up with the record, and made by the recording officer before the committing officer to the effect that the deponent did, in fact, duly make before him the statement recorded, as evidence of that fact. In such a case, the recording officer must himself be called and examined by the Court of Session, except in cases in which the presence of the recording officer cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court of Session considers unreasonable—*Noshi Mistri and another v. Empress*, I. L. R. 5 Cal. 958.

**Representative in interest.**—In order to satisfy the requirements of this section the two suits must be brought by or against the same parties or their representatives in interest *at the time when the suits are proceeding and the evidence is given*—*Sitanath Dass v. Mohesh Chunder Chuckerbutty*, I. L. R. 12 Cal. 627. See also *Mrinomoyee Dabia v. Bhooban Moyee Dabia*, 23 W. R. 42.

**Cross-Examination.**—It must appear that the party against whom depositions given in a previous judicial proceeding are offered in evidence, had the power and opportunity of cross-examining the

witnesses ; but it is by no means requisite that he should exercise that power. This section will not allow a co-defendant to use as evidence in a subsequent proceeding the evidence of a witness produced by another co-defendant.

(a). In 1874 five out of six persons who were named as having committed a murder were arrested, and after inquiry before a Magistrate were tried before the Court of Session and convicted. At the time of the inquiry before the Magistrate the sixth accused person absconded, as was recorded by the Magistrate. In their examination before that officer, the witnesses deposed to the absconder having been one of the participators in the crime charged against the prisoners then under trial. In the Sessions Court the Judge did not record that the sixth accused person had absconded, and the evidence was recorded only against the prisoners then under trial. In 1886 the absconder was apprehended and tried before the Court of Session upon the charge of murder. At that time most of the former witnesses were dead, and the Sessions Court referring to this section, admitted in evidence against the prisoner the depositions given in 1874 before both the Magistrate and the Sessions Court. He also admitted the deposition of a surviving witness which had been given in 1874 before the Sessions Court. This witness now also gave evidence against the prisoner. *Held*, that the depositions were not admissible in evidence under this section, the prisoner not having been a party to the former proceedings, and not having then had an opportunity of cross-examining the witnesses—*Queen-Empress v. Ishri Singh*, I. L. R. 8 All. 672.

(b). Depositions of absent witnesses are only admissible when the prisoner has had the right and the opportunity to cross-examine—*Queen v. Etwari Dhari*, 21 W. R. Cr. 12.

(c). A, B, and C having been charged with murder before a Magistrate, two vakeels presented their vakalutnamahs, and applied to be allowed to conduct the defence of the accused. The Magistrate refused permission, and after recording the depositions of the witnesses committed the accused to take their trial before the Sessions Court. In the Court of the Magistrate the only material evidence for the prosecution was that of three witnesses, who on being examined in the Sessions Court, denied all knowledge of the facts to which they had deposed before the Magistrate. Two of them denied having made the statements recorded, while the third admitted the statements attributed to him, but asserted they were false and made under pressure. The Sessions Judge, disbelieving the statements made in his Court, thereupon under sec. 249, Criminal Procedure Code, used the

previous depositions as evidence in the case, and mainly upon these, convicted the accused of murder. The prisoners appealed to the High Court, on the ground that the previous depositions ought not to have been used as evidence in the case, as the Magistrate had refused to allow their pleaders to appear and cross-examine the witnesses who made the depositions. The High Court Judges (Jackson and Tottenham JJ.) held that the depositions were admissible. They said: "It does not appear that the pleaders who were retained by the accused made any attempt to cross-examine the witnesses, for they might have suggested to the accused the proper questions to be put to the witnesses; nor in fact are we disposed to think that at that stage of the proceedings, cross-examination, if resorted to, would have been of any benefit to the accused. Very probably it would not, the Court thinks, have been resorted to at all"—*In the matter of Dham Mondul and others*, 6 C. L. R. 53. With due deference to the opinion of the eminent Judges who decided this case, we are inclined to think that the reasoning of their Lordships is not sound, and that the depositions ought not to have been considered as 'duly taken,' in the presence of the accused. Secs. 208 and 356 of the Criminal Procedure Code and sec. 138 of the Code, make it clear that no deposition is to be considered as 'duly taken' if the party against whom it is given, desires to cross-examine the deponent and is denied the right to do so.

**Questions in issue, substantially the same.**—(a). Although the Act, in using the word 'questions' in the plural, seems to imply that it is essential that all the questions shall be the same in both proceedings to render the evidence admissible, that it is not the intention of the law. The principle involved in requiring identity of the matter in issue, is to secure that in the former proceeding the parties were not without the opportunity of examining and cross-examining to the very point upon which their evidence is adduced in the subsequent proceeding. And though separate proceedings may involve issues, of which some only are common to both, the evidence to those common issues given in the former proceeding may (on the conditions mentioned in the section arising) be given in the subsequent proceedings. Thus, "if in a dispute respecting lands, any fact comes directly in issue, the testimony given to that fact is admissible to prove the same point in another action between the same parties, or their privies, though the last suit relates to other lands—*Vide Ramma Reddi petitioner*, I. L. R. 3 Mad. 48.

(b). In the case of *Rockia Mohato*, I. L. R. 7 Cal. 42, Pontifex J. observed: "It appears to us that, by 'the questions in issue,' referred to in sec. 33, being required to be 'substantially the same,' it is not intended that, in a case where the prisoner injured dies subsequently

to the enquiry before the Magistrate, his evidence is not to be used before the Sessions Court, because in consequence of his death other charges are framed against the accused. The question whether the proviso to sec. 33 is applicable, that is, whether the questions in issue are substantially the same, depends upon whether the same evidence is applicable, although different consequences may follow from the same act. Now, here the act was the stroke of a sword which, though it did not immediately cause the death of the deceased person, yet conduced to bring about that result subsequently. In consequence of the person having died, the gravity of the offence became presumptively increased; but the evidence to prove the act with which the accused was charged remained precisely the same."

**Instances of Admissible depositions.**—(a). A prisoner accused of having committed murder at Zanzibar was sent by the British Consul there for trial before the High Court at Bombay. The Consul could not enforce the attendance of witnesses at Bombay, but he transmitted to the High Court the depositions which he had taken in the course of the inquiry he had held with regard to the commission of the alleged offence. In the absence of the witnesses these depositions were tendered in evidence at the trial in Bombay. *Held*, that the British Consul at Zanzibar was authorized to take the depositions and that they were admissible in evidence at the trial, under this section—*Empress v. Dossaji Gulam Husein*, 1 L. R. 3 Bom. 334.

(b). Where a witness testified in a suit, wherein A and several others were plaintiffs and B defendant, his testimony was, after his death, held admissible in a subsequent action relating to the same matter brought by B against A alone—*Wright v. Doe d. Tatham*, 1 A. and E. 3.

(c). If in a dispute respecting lands any fact comes directly in issue, the testimony given to that fact is admissible to prove the same point in another action between the same parties or their privies, though the last suit relate to other lands—*Doe v. Foster*, 1 A. and E. 791.

(d). A deposition taken on a charge either of assault and robbery or of stabbing, or of doing grievous bodily harm, can, after the death of the witness, be read upon a trial for murder, where the two charges relate to the same transaction.—*Vide* Taylor, sec. 436.

**Provisions of law for the examination of witnesses by commission.**—(a). Secs. 388 to 391 of the Civil Procedure Code provide for the issue of commissions for the examinations of witnesses in civil cases.

(b). As to the practice when witnesses are examined under a commission issued by the High Court on its original side refer to (1) *Pran Krishna Chandra v. Biswanath Chandra*, 8 B. L. R. App. 101 ; (2) *Dwarkanath v. Ganga Devi*, 8 B. L. R. App. 102.

(c). Secs. 503-507 of the Code of Criminal Procedure, provide for the examination of witnesses by commission in criminal proceedings.

(d). As to execution of commission issued by foreign Criminal Courts refer to sec. 19 of 'The Foreign Jurisdiction and Extradition Act' XXI of 1879.

Evidence taken by commission cannot be read as evidence, unless the commission be issued by the Court itself, or unless it is admissible under this section—Vide *Empress v. Debi Prasad*, I. L. R. 6 Cal. 532 ; *Queen-Empress v. T. Burke*, I. L. R. 6 All. 224 ; *Queen-Empress v. Jacob*, I. L. R. 19 Cal. 113.

**Instances of inadmissible depositions.**—(a). This section does not apply to the deposition of a witness in a former suit which is sought to be used against him in a subsequent suit in which he is a defendant, not as evidence between the parties, but as an admission against himself—*Soojan Bibi v. Achmut Ali*, 21 W. R. 414.

(b). The evidence of a witness taken upon commission is not admissible in a criminal trial held before the High Court, unless it can be shown that such evidence was so taken upon an order made by that Court under sec. 76 of Act X of 1875 or unless it is admissible under this section—*Empress v. Dabi Prasaud*, I. L. R. 6 Cal. 532. Vide also *Queen-Empress v. A. M. Jacob*, I. L. R. 19 Cal. 113.

(c). A deposition made by a person wherein he denied on oath that he had presented a certain petition in Court which purported to be from him, was held to be inadmissible as evidence under this section, because the person might have been brought into Court, but was not brought by those who pleaded the said deposition—*Bhooban Moyee Dassi v. Ambica Charn Sett and others*, 23 W. R. 343.

(d). The evidence of a witness given in a proceeding pronounced to be *curam non judice* cannot be used under this section, if the witness is dead, on a retrial before a competent Court. *Rami Reddi v. Seshu Reddi*, I. L. R. 3 Mad. 48. In this case R charged A with criminal breach of trust, and S gave evidence in support of the charge ; A being acquitted R was tried for making a false charge and S for perjury : *Held*, that the depositions given by witnesses in the first case could be used against R in the second case, but not against S under this section.

(e). If the point in issue, though very similar, was so far different in the two proceedings, that the witness, who was called to prove or

disprove the issue in the former, need not have been *fully* cross-examined in regard to the matters in controversy in the latter, his deposition, if tendered on the second trial, will be excluded—*Vide* Taylor, sec. 437.

Where a summons was taken out for service upon one J, who lived at a *Kachari* house, but the peon in his return stated that he was unable to find him and serve him personally, and had hung up the summons in the *Kachari* house; and there was evidence to show that J had suddenly disappeared from the *Kachari*, and that inquiry had been made for him in his native village, but without result, it was held that J's former deposition was properly admitted—*Empress v. Rochia Mahato*, I. L. R. 7 Cal. 42.

*Statements made under Special Circumstances.*

34. Entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.

Entries in  
books of account  
when relevant.

*Illustration.*

A sues B for Rs. 1,000, and shows entries in his account-book showing B to be indebted to him to this amount. The entries are relevant, but are not sufficient, without other evidence, to prove the debt.

**Purport of the section.**—This section has made an alteration in the law as laid down by sec. 43, Act II of 1855. By sec. 43, Act II of 1855, documents of the kind herein mentioned, were declared to be only admissible as corroborative, but not as independent, proofs of the facts stated therein. That language has not been adopted in the present Act. The only limitation in this section is that statements contained in such documents shall not alone be sufficient evidence to charge any one with liability.

Secs. 34 to 38 relate to statements which are made under circumstances which in themselves are a strong reason for believing them to be true, and in these cases there is generally little use in calling the persons by whom the statements were made.

**Banker's Books.**—(a). Banker's books kept according to the custom of Mahajans are not of themselves sufficient evidence to

establish a demand against the representatives of a deceased customer. Strict proof of the debt should be given—*Raikrishna v. Rai Hari Krishna*, 5 Moo. I. A. 432.

(b). Where the fact of payments by a banking firm is distinctly put in issue the books of the firm being at most corroborative evidence, the mere general statement of the banker to the effect that his books were correctly kept is not sufficient to discharge the burden of proof that lies upon him—*Babu Ganga Prasad and another v. Babu Indrajit Singh and another*, 23 W. R. (P. C.) 390.

(c). The Banker's Books Evidence Act, XVIII of 1891, makes certified copies of entries in Banker's books *prima facie* evidence of the existence of such entries, and admissible in evidence to the same extent as the originals.

**Books of Account.**—The regular proof of books of account, requires that the clerks who have kept those accounts, or some person competent to speak to the facts, should be called to prove that they have been regularly kept, and to prove their general accuracy. Although it may be no doubt important to show, that the person making or dictating the entries had or had not a personal knowledge of the facts stated, this is a question which, according to the law as laid down in this section, affects the value, not the admissibility, of the entries. All that is required now is that entries in accounts should, in order to be relevant, be regularly kept in the course of business.\* Under the English common law a party is not allowed to prove, in his own behalf, an entry in his books made by himself. But as the books of tradesmen are usually kept with tolerable, and in some instances, with great accuracy, the law of this country has, in the case of books of account kept in the regular course of business, made an exception to the rule alike of law and common sense, that a man shall not be allowed to manufacture evidence for himself.

(a). Two firms entered into a joint adventure which was to be conducted by an agent specially appointed by both firms. One of the firms brought a suit against the other to recover their share of the alleged loss upon the joint adventure. To prove their case the plaintiffs filed *books of account* kept by themselves; *held*, that they were not sufficient evidence to entitle the plaintiffs to a decree, in the absence of evidence showing that the sums mentioned in the books as having been paid to the agent specially appointed for carrying on the joint adventure were really applied by such agent

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\* *Vide Reg. v. Hanumanta*, I. L. R. 1 Bom. 610.



for the purpose of such adventure—*Seth Lakhmi Chand and others v. Seth Indra Mull and others*, 13 W. R. (P. C.) 36.

(b). One party by merely producing his own books of account, cannot bind the other—*Sorabjee Vacha Ganda v. Koonourjee Manickjee*, 5 W. R. (P. C.) 29.

(c). Where A wrote up B's books of account at intervals of a week or a fortnight on information or loose memoranda supplied by A, the books so written up were 'not regularly kept in the course of business.' It is only such books as are entered up as transactions take place, that can be considered as books regularly kept in the course of business within the meaning of this section—*Munchershaw Bejonri v. The New Dhurumsey Spinning and Wearing Company*, 1 L. R. 4 Bom. 576.

**Canoongoe Papers.**—Canoongoe papers are good evidence in questions of parganah rates, standards of measurement, and the like—*Nand Dantpat v. Tara Chand Prithibaree*, 2 W. R. (Act X) 13.

As to admissibility of old canoongoe papers, see *Dwarkanath Chuckerbutty v. Tara Soonduri Burmoni*, 8 W. R. 517.

**Collection Papers.**—Collection papers are no evidence *per se*, and can only be used when they are produced by a person who has collected rent in accordance with them, and who merely uses them for the purpose of refreshing his memory—*Mahomed Mahmood v. Safur Ali* 1 L. R. 11 Cal. 407.

**Factory Books.**—Factory books cannot be used as independent primary evidence of the payments to which the entries refer—*The Queen v. Hardeep Sahoy*, 23 W. R. Cr. 27.

**Isamnavisi Papers.**—These are returns made by the Police generally on the information of the ghatwally holder, stating his name, the quantity of land which he holds and the rent which he pays for it. As to value of such papers, vide *William Farquharson v. Dwarkanath Singh and the Government of India*, 14 Moo. I. A. 259 ; (16 W. R. P. C. 29).

**Jumabandi Papers.**—(a.) *Jumabandi* papers can never be treated as independent evidence of any contested fact—*Chamarnee Bibi v. Ayenoolah Sirdar and others*, 9 W. R. 451.

(b). *Jumabandi* papers can only be used as corroborative evidence of the same value as that which is attached to books of account—*Gujjo Koor v. Syud Aalay Ahmed*, 1 W. R. 474.

(c.) *Jumabandi* papers filed by a malik in butwara proceedings to which the tenant is not necessarily a party, cannot be used as evidence

against such tenant in a suit for arrears of rent—*Kishore Doss and others v. Purson Mahtoon and others*, 20 W. R. 171.

(d). If the auction-purchaser of a khas mehal seeks to make the tenant pay more than the latter has hitherto paid, he must issue a notice on him; he cannot sue him for enhanced rent upon a *Jumma-bandi*, to the terms of which the tenant has not consented—*Enayetoolah Miah v. Nabo Kumar Sarkar*, 20 W. R. 207.

(e). *Jumma-bandi* papers, without the personal testimony of the pat-waree who filed them, are valueless.—*Pundit Bhagwan Dutt Jha and another v. Sheo Mongal Singh*, 22 W. R. 256.

(f). Where increased rent is imposed in the course of settlement-proceedings, the Collector's *Jumma-bandi* must show the consent of all the ryots before they can be held to be bound by it—*Reazooddeen Mahomed and another v. Mr. R. McAlpine*, 22 W. R. 540.

(g). In the case of *Akshya Kumar Dutt v. Shama Charan Patitanda*, I. L. R. 16 Cal. 586, it was held that 'one or other of two things must occur in order to make the enhanced rent stated in a *Jumma-bandi* settled under the Regulation VII of 1822, binding upon a tenant. There must be either an assent to that enhancement, or else there must be a compliance with the provisions of the rent-law with regard to enhancement of rent; because it was long settled law, established by a series of decisions, that the rent of a Government khas mehal could only be enhanced by the same process as the rent on any private estate.' See also I. L. R. 12 All. (F. B.) 301.

(h). Where the rayats signed a *Jumma-bandi* they were held to be bound by it, their signatures thereto being regarded as an admission of the correctness of its contents—*Robert Watson & Co. v. Mohendra Nath Pal*, 23 W. R. 436.

**Jumma-Wasil-Baki Papers.**—(a). *Jumma-wasil-baki* papers are at the best corroborative evidence, not independent testimony—*Bejoy Gopal Burral and others v. Bheekoo Roy*, 10 W. R. 291.

(b). In the case of *Surnomoyi v. Johur Mahomed Nasyo and others*, 10 C. L. R. 545, their Lordships observed: It seems to us that the terms of sec. 34 of the Evidence Act do not give such papers (*Jumma-wasil-baki papers*) any weight beyond that of corroborative evidence.

*Vide*, 1. *Ramlal Chuckerbutty and another v. Tarasundari Barmonya*, 8 W. R. 280.

2. *Shekh Newasee and others v. Mr. L. Lloyd*, 8 W. R. 464.

3. *Kheero Monee Dassi and others v. Bejoy Govind Borral and others*, 7 W. R. 533.

4. *Roushan Bibee v. Hurray Kristo Nath and another*, I. L. R. 8 Cal. 926.

(c). *Jumma-wasil-baki* papers are private memoranda made for the Zamindar's own use and by his own servants and must be looked upon with great suspicion, for nothing can be easier to supplement defective oral evidence by the production of a document which can be manufactured at any time and to any pattern—*Vide* remarks of their Lordships in the case of *Allyat Chinaman v. Jug-gut Chunder Roy*, 5 W. R. 242.

(d). *Jamma-wasil-baki* papers are not admissible as independent evidence, but may be used by the person, who collected the rents, to refresh his memory or for corroboration—*Akhil Chundra Chowdhary v. Naya*, I. L. R. 10 Cal. 248.

(e). Though not alone sufficient to charge any one with liability, documents admissible as evidence under this section were held to be sufficient to answer a claim set up from what would be the ordinary liability of a tenant; e.g., in a suit for enhancement of rent, to rebut a presumption arising from uniform payment for 20 years—*Belaet Khan v. Rashbehari Mukerji*, 22 W. R. 549. See also *Surnomoyi v. Johar Mahomed Nasyo and others*, 10 C. L. R. 545; *Shib Pershad Doobey v. Promotho Nath Ghose*, 10 W. R. 193.

**Absence of Entries.**—(a). Though the actual entries in books of account regularly kept in the course of business, are relevant to the extent provided for by this section, such a book is not by itself relevant to raise an inference from the absence of any entry relating to a particular matter—*The Queen-Empress v. Grish Chunder Banerji*, I. L. R. 10 Cal. 1024. *Vide* *Pragdas Thacoordas and others v. Dowlat ram Nanuram*, I. L. R. 11 Bom. 257.

(b). The mere omission of an accountable party framing his own account, to carry forward into a new account, a balance against himself existing in a former one, can constitute no evidence in his own favour. To prove the existence of the balance, such omission must be considered in conjunction with other evidence in the cause—*Mulka Mukhdra Begam of Ex-King of Oudh v. Tekaeth Ray*, 14 W. R. (P. C.) 24.

35. An entry in the public or other official book, register or record, stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty, or by any

Relevancy of entry in public record, made in performance of duty.

other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact.

See notes to sec. 34.

**Scope of the Rule.**—This section provides for the reception of what is in the nature of hearsay evidence afforded by entries of facts made in public or official books, registers, or records, which are kept in the performance of a duty specially enjoined by the law of the country; but the facts, in order to be admissible, must be originally relevant under some section or other of the Code. It does not however make the public book evidence to show that a particular entry has not been entered in it. In England, entries in registries and public books, to be admissible, must have been promptly made, and in the manner, if any, required by law. No such rule is provided for by this Act. But it seems that the laws of both England and India require that to render any document admissible in evidence as an *official register*, it must be one which *the law requires to be kept for the public benefit*.

**Reason of the Rule.**—“These documents (official registers) as well as all others of a public nature, are generally admissible in evidence, although their authenticity be not confirmed by the usual tests of truth, namely, the swearing and the cross-examining of the persons who prepared them. They are entitled to this extraordinary degree of confidence, partly because they are required by the law to be kept, partly because their contents are of public interest and notoriety, but principally because they are made under sanction of an oath of office, or at least under that of official duty, by accredited agents appointed for that purpose. Moreover, as the facts stated in their entries are of a public nature, it would after all be difficult to prove them by means of sworn witnesses.”—Taylor’s Evidence, sec. 1429.

“Documentary evidence of a public nature and of public authority, are generally admissible in evidence, although their authenticity be not confirmed by the usual and ordinary tests of truth, the obligation of an oath and the power of cross-examining the parties on whose authority the truth of the document depends. The extraordinary degree of confidence, that is reposed in such documents, is founded principally upon the circumstance that they have been made by authorized and accredited agents appointed for the purpose, and also partly on the publicity of the subject-matter to which they relate and in some instances upon antiquity.”—Best.

**Public Official.**—For the definitions of these terms reference may be made to section 74, *post*.

**Books, Registers, &c., coming within the purview of this section.**—Justice Field mentions the following:—"Log-books (see secs. 103-108, Act I of 1859, and secs. 280-285 of the Merchant Shipping Act, 17 and 18 Vict. Cap. 104);—Marriage registers (See secs. 28, 32 and 54, and schedules III and IV, Act XV of 1872; 14 and 15 Vict. Cap. 40; secs. 14, 21, and 49 of the repealed Act V of 1885; the repealed Act XXXV of 1874; sec. 44 Act V of 1865, sec. 6 and schedule, Act XV of 1865 (Parsees); Act III of 1872; Registers directed by Part XI of the Indian Registration Act III of 1877; Registers of printing-presses, newspapers, and books published in India, Act XXV of 1867; of copy-right, Act XX of 1847; of new inventions, designs, patterns, &c., sec. 11, Act XV of 1859 Act XIII of 1872; of literary, scientific and charitable societies, Act XXI of 1860; of joint-stock companies, &c., under the Indian Companies Act X of 1866; *Ramdas Chuckerbutty v. The Official Liquidator*, I. L. R. 9 All. 366, of British Ships, Sec. 4, Act X of 1841; 17 and 18 Vict. Cap. 104—Registers prescribed by the various Municipal Acts; proceedings of Registered Companies and Municipal Committees, recorded in accordance with the provisions of the particular Act applicable thereto; of vessels on the river Indus, Act I (Bom. C.) of 1863. Records of Rights, sec. 14 of the Punjab Land Revenue Act XXXIII of 1871, and secs. 94-106 of the North-Western Provinces Land Revenue Act XIX of 1873; the Settlement Record prescribed by clause 9, sec. 9, Bengal Regulation VII of 1822; Registers of Chakeran lands; *Collector of East Burdwan v. Imdad Ali*, W. R. 1864, 358. Quinquennial Registers in the Bengal Presidency (*Udai Mani Debya v. Bishonath Dutt*, 7 W. R. 14; and see *Kashi Chundra Rai v. Nur Chundra Debya Chowdhra*, 18th April 1849, S. D. A. Decis. Beng. 113; Registers of tenures under the Chota Nagpur Tenure Act II of 1869, B. C.; *Kirpal Narain Tewari v. Sukarmani*, I. L. R. 19 Cal. 91, (entry in Bhuihari Register admissible but not conclusive evidence). Register of Mahomedan Marriage Act I of 1876 (B. C.); *Khadim Aly v. Tazimannissa*, I. L. R. 10 Cal. 607 (entry of special condition of wife's right to divorce husband admissible; Revenue Registers in the Madras Presidency: *Baythamma v. Avolla*, I. L. R. 15 Mad. 19; Registers under the Bengal Land Registration Act VII (B. C.) of 1876, as to the effect of entries in the Registers under which Act, see *Rambhusan Mahto v. Dabi Mahto*, I. L. R. 8 Cal. 853. (Entry is no evidence of title, though it may be of possession); *Saraswati Dasi v. Dhanpat Singh*, I. L. R. 9 Cal. 431; 12 C. L. R. 12; *Ram Mandar v. Janki Porshad*, 12 C. L. R. 139 (an order under sec. 59 has the effect of

dispossessing the person against whom it is made); *Omranniassa Bibi v. Dilawar Ali*, I. L. R. 10 Cal. 350; (an order under sec. 55 has similar effect, but not an order under sec. 52). So, the statement made by a survey officer in a village register of lands that the name of a certain person was entered as occupant would be admissible, if relevant, but it would not be admissible to prove the reasons for such an entry as facts in another case; *Govindrav Deshmukh v. Raghu Deshmukh*, I. L. R. 8 Bom. 543: and the fact of a person's name being entered in the Collector's book as occupant of land does not necessarily of itself establish that person's title or defeat the title of any other person; *Bhagaji v. Bapuji*, I. L. R. 13 Bom. 75. An entry in the *paimaish* (survey measurement) account alone is not sufficient evidence to establish a right which is denied: *Keshavan v. Vasudevan*, I. L. R. 7 Mad. 297." Evidence Act, 5th Ed., pp. 221-223.

**Bhuhinary Register.**—A Bhuhinary Register prepared under Bengal Act II of 1869, is not conclusive evidence of the title of the person recorded therein.—*Kirpal Narayan Tewari v. Sukurmoni*, I. L. R. 19 Cal. 91.

**Certificate of Guardianship.**—A certificate of guardianship is neither a book nor a register, nor a record kept by any officer in accordance with any law, and is therefore no evidence under this section of the age of the person whose guardian has been appointed—*Satis Chundra Mukhopadhyaya v. Mohendra Lal Pathuk*, I. L. R. 17 Cal. 849.

**Butwarah Papers.**—Butwarah papers are only evidence of the proportionate assessment of Government revenue payable by proprietors after partition; not evidence, binding ryots as to what holdings are theirs, or what their areas, rates, or periods of occupancy are—*Drobo Moyee Gosmanee v. Dharmo Das Koondoo*, 10 W. R. 197.

**Chakeran Lands, Registers of.**—The registers of chakeran lands are public records supposed to contain a correct list of the chakeran lands in existence at the time of the Decennial Settlement—*The Collector of East Burdwan v. Sheikh Imdad Ali and others*, W. R. (1864) 358.

**Collector's Books.**—(a). The fact of a person's name being entered in the Collector's book as occupant of land does not necessarily of itself establish that person's title, or defeat the title of any other person. The Collector's book is kept for purposes of revenue not for purposes of title—*Bhagoji and another v. Bapuji*, I. L. R. 13 Bom. 75.

(b). An entry by an Assistant Collector under sec. 5 of Reg. XVI of 1827, constituting a declaration against a person's title is an official

act within this section, and is therefore admissible—*S. Malapa v. B. Mariapa*, 10 B. H. C. R. 199.

**Land Registration.**—(a). Registration of land under Bengal Act VII of 1876 is not only not conclusive proof, but no evidence at all, upon the question of title of a proprietor so registered. Such registration does not relieve a plaintiff from the onus of proving his title to land claimed by him—*Ram Bushan Mahto v. Jebli Mahto*, I. L. R. 8 Cal. 853.

(b). In the case of *Saraswati Dassi v. Dhanpat Singh*, I. L. R. 9 Cal. 431, it has been held that this section relates to the class of cases where a public officer has to enter, in a register or other book, some actual fact which is known to him, e.g., the fact of a death or marriage. Entries made under Bengal Act VII of 1876 by the Collector recording the names of proprietors of revenue-paying estates are not evidence under this section of the fact of proprietorship, as such entries are not, properly speaking, entries of facts. Their Lordships, however, remarked that under certain circumstances such entries might be evidence of possession as between the parties, who disputed the fact of possession before the Collector.

(c). The view expressed by Garth C. J., in the case of *Saraswati Dassi v. Dhanpat Singh*, I. L. R. 9 Cal. 431, was dissented from in *Shoshi Bhosun Bose v. Girish Chunder Mitter*, I. L. R. 20 Cal. 940. In this case some extracts from the Collector's register kept under Bengal Act VII of 1876, the Land Registration Act, were tendered in evidence for the purpose of showing that certain individuals were the registered proprietors of the *toujis* mentioned in the register, and the quantity of land held by them: *held*, that entries in a register made under Bengal Act VII of 1876 by the Collector are entries made in an official register kept by a public servant under the provisions of a Statute, and certified copies of such entries are admissible in evidence for what they are worth. This case relied upon the Privy Council case of *Lekhraj Kaur v. Mahopal Singh*, I. L. R. 5 Cal. 744.

**Mahomedan Marriage Registration.**—A husband and wife, Mahomedans, registered their marriage under Bengal Act I of 1876, setting out in the form prescribed in Schedule A to the Act, as "a special condition" that the wife under certain circumstances therein set out might divorce her husband. These circumstances occurred, and the wife divorced her husband. *Held*, in a suit by the husband for restoration of his conjugal rights, that the 'special condition' was a matter which, under the provisions of the Act, it was the duty of the Mahomedan Registrar to enter in the register, and that, therefore, a

copy of the entry in the register was legal evidence of the facts therein contained—*Khadem Ali v. Tajimunnissa*, I. L. R. 10 Cal. 607.

**Measurement Papers prepared by Butwara Ameen.**—The measurement papers prepared by a Butwara Ameen deputed by the Collector to make a partition, do not come within this section—*Mohi Chowdhry v. Dhiro Misraim*, 6 C. L. R. 139.

**Non-existence of Entry.**—This section does not make the public book evidence to show that a particular entry *has not been entered in it*.—*In re Juggun Lal*, 7 C. L. R. 356.

**Quinquennial Register.**—Such registers are admissible in evidence—*Shoshi Bhosun Bose v. Girish Chunder Mitter*, I. L. R. 20 Cal. 940, but see remarks of Field J., in *Saraswati Dassi v. Dhanpat Singh*, I. L. R. 9 Cal. 437.

**Recital in a Judgment.**—(a). In a suit by a milkanomdar to redeem a kanom, the kanom document was proved to have been lost; it appeared that a previous suit had been brought by the jenmi to redeem the same kanom, and the judgment in that suit, in which it was stated that the defendants admitted their position as kanomdars, was tendered in evidence to prove the jenmi's title: *held*, that the recital of the admission in the judgment was a relevant fact as evidence of the jenmi's title under this section—*Thama v. Kondan and others*, I. L. R. 15 Mad. 378.

(b). In a suit by the plaintiff as the karnavan to recover lands in the possession of the defendants, who were a donee from and the descendants of a previous karnavan and their tenants, an order of a District Munsif reciting a petition to which the alleged previous karnavan was a party, was put in evidence to show that he had in a particular instance acted in the capacity of karnavan; *held*, that the entry was admissible under this section—*Byathamma v. Avulla*, I. L. R. 15 Mad. 19.

(c). In a suit for possession of a fishery, the plaintiff sought to put in evidence an admission alleged to have been made in the year 1818 by the defendant's predecessor in title in a written statement in a former suit. The only evidence of the admission was that contained in the decree in the former suit, the ordinary part of which was prefaced with a short statement of the pleadings in the suit. Under the old practice of Muffasil Courts, it was the duty of the Court to enter in the decree an abstract of the pleadings in each case. *Held*, that the statement in the decree was evidence of the admission under this section—*Parbutty Dassi v. Purno Chunder Singh and others*, I. L. R. 9 Cal. 586.



(d). The appellants filed an application for the admission in evidence of certified copies of certain judgments and decrees rejected by the Lower Court. They sought to make use of these documents, not as containing matters in dispute, but as containing summaries of statements made by parties concerned in the management of the plaint-properties and as evidence of conduct: *held*, that they were inadmissible either under this section or sec. 13—*Subramanyan v. Paramaswarn*, I. L. R. 11 Mad. 116.

(e). Refer to *Venkatasami v. Venkatarreddi*, I. L. R. 15 Mad. 12.

**Reports of Public-officers.**—When reports of public officers express opinion as to private rights of parties, such opinions are not to be regarded as having judicial authority or force. But being the reports of public officers made in the course of duty, and under statutable authority, they are entitled to great consideration, so far as they supply information of official proceedings and historical facts, and also in so far as they are relevant to explain the conduct and acts of the parties in relation to them, and the proceedings of Government founded upon them—*Rajah Mathuramlinga Shebpati v. P. Pellia*, L. R. 1 I. A. 239.

**Road-cess Papers.**—A road-cess return made by a shareholder is not admissible as evidence against another shareholder—*Nassirun v. Gouri Sunker Sing*, 22 W. R. 192.

**Special Commissioner's Report.**—The report of the Special Commissioner is not admissible in evidence, as it does not come within any provision of the Evidence Act—*Rajah Leelanund Singh v. Mussamat Lakhputee Thakoorain*, 22 W. R. 231.

**Statement by Survey-officer.**—Under this section a statement by the Survey-officer that the name of this or that person was entered as occupant would be admissible if relevant, but it would not be admissible to prove the reasons for such an entry as facts in another case—*Govendrao Deshmukh v. Raghu Deshmukh*, I. L. R. 8 Bom. 543.

**Survey Award.**—In the case of *Kashi Kishore Roy Chowdhary v. Bama Sundary Debi Chowdharin*, 23 W. R. 27, it was held that the survey award was evidence *quantum valeat* between the parties to the fact of possession. *Vide* 19 W. R. 202; 10 W. R. 343; 15 W. R. 218.

**Teiskhana Register.**—A Teiskhana register prepared by a patwari under rules framed by the Board of Revenue under sec. 16 of Regulation XII of 1817 is not a public document, nor is the patwari preparing the same a public servant—*Baijnath Singh and others v. Sukhee Mahton*, I. L. R. 18 Cal. 534.

**Wajib-ul-araz.**—Under Regulation VII of 1822, extracts from *wajib-ul-araz* or village administration papers, and statements of the

proprietors of villages showing that in a particular clan, daughters were excluded by the custom of the clan from succeeding to the inheritance of their father's estate, were recorded and duly authenticated by the proper officers: *Held*, that the records containing such extracts and statements were admissible in evidence under this section. Such statements and extracts may also be admissible in evidence under secs. 48 and 49 of the Code—*Lekraj Kuar v. Mahapal Singh*, I. L. R. 5 Cal. (P. C.) 744.

36. Statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of Government, as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts.

Relevancy of statements in maps, charts and plans.

**Survey Map.**—(a). In the case of *Nobo Coomar Dass v. Gorind Chunder Roy*, 9 C. L. R. 305, Field J. made the following observations :—" A survey in these provinces is not made under the authority of any enactment of the Legislature. It is a purely executive act, if I may use an expression well understood in this country. At the same time it must not escape notice that the proceedings of the Survey authorities have been recognised by the Legislature and are referred to in Act IV of 1847. The rules made for the guidance of the Survey authorities are embodied in a manual issued by the Board of Revenue, and some of these rules contain matter addressed by way of instruction and direction to the officers engaged in survey operations, who are required to seek the co-operation of the parties interested in the measurement. The parties are to be induced, if practicable, to make themselves acquainted with the contents of the thak and khusras plans, and to sign them or state their objections in writing. Persons who are familiar with what takes place in these provinces, when Survey-officers commence operations in a locality, are well aware that neighbouring proprietors do, as a rule, carefully watch their proceedings ; and if the persons interested consider that the boundary demarcated by these officers between any two estates is incorrect, they take immediate and prompt action to object and to have the map rectified. We must then look at the matter somewhat in this way. The proprietors of estates have reasonable notice, and may be presumed to be well aware that the boundaries are about to be demarcated upon a map made by impartial Government officers,

and which is by consent and usage regarded as important evidence in cases of boundary dispute : they are invited to co-operate and to point out to the survey officers what they admit to be true boundaries between their estates. If they or their agents point out the boundaries, and the boundaries so pointed out are demarcated on the survey map which is then signed by them, this map is good evidence of an admission as to the correctness of the boundaries shown thereon. If the proprietors or their agents do not actively point out the boundaries, but afterwards sign the map, it is still evidence of an admission, though not of so strong a nature as in the case first put. If the Survey-officers without active assistance from those interested demarcate the boundaries, and no objection is raised to their correctness, the reasonable supposition is that objections would have been raised if the boundaries were not correct ; and we have here admission by conduct. If objections are raised and abandoned, or if objections taken before the Survey-officer unsuccessfully are not persisted in, no attempt being made to have the survey map rectified by a suit brought for this purpose, we have again evidence of admission by conduct, the value of which varies according to the circumstances supposed. If a suit has been brought to rectify the map and brought successfully or unsuccessfully, there is a judicial decision as to the accuracy of the map or otherwise. The value of any particular survey map in evidence will vary according as the above circumstances are or are not brought out in evidence, and of course as time passes on, and the production of living witnesses of what took place at the time of the survey proceedings becomes more or less impossible, the difficulty is increased of producing evidence which will enable the Court to weigh the value of a particular map in nice scales. Now the proposition which, it appears to me, is to be deduced from the cases is this : a survey map is not direct evidence of title, in the same way as a decree in a disputed cause is evidence of title, for the survey officers have no jurisdiction to enquire into or decide questions of title. Their instructions are to lay down the boundary according to actual possession at the time ; and this is what they do, ascertaining such actual possession as well as they can, and, if possible, by the admissions of all the parties concerned. A survey map is, therefore, good evidence of possession according to the boundary demarcated thereupon, and which may be taken to have been admitted by those concerned to be correct, regard being had to what has been said about the nature of this admission in each particular case. A survey map is then direct evidence of possession and with reference to the particular circumstances of each case, the Courts must decide whether this evidence of possession is sufficient to raise a reasonable presumption of title."

The following cases were considered in the case mentioned above :— 1 W. R. 333 ; 2 W. R. 210 ; 6 W. R. 267 ; 10 W. R. 301 and 343 ; 12 W. R. 180 ; 19 W. R. 202 ; 22 W. R. 296 ; 23 W. R. 27 ; 24 W. R. 317 ; 25 W. R. 36 and 453 ; 1 B. L. R. C. Ap. 5 ; and I. L. R. 5 Cal. 214. In this connection refer also to (a) *Kussessur Roy v. Joggodishuri*, 7 C. L. R. 269 ; (b) *Gudadhar Banerji v. Tara Chand Banerji*, 15 W. R. 3.

(b). Survey maps are evidence not only with regard to the physical features of the country which are depicted upon the maps, but also with regard to the other circumstances which the officers deputed to make the maps are specially commissioned to note down—*Koomoodini Debia v. Poorno Chunder Mukerji*, 10 W. R. 300.

(c). In some cases the evidence of survey maps may be sufficient to prove a title. But each case must be decided upon its own merits. A survey map is evidence of possession at a particular time, the time at which the survey was made ; and coupled with other evidence may raise a presumption that the land belonged to the estate at the time of the permanent settlement. When two sets of survey maps taken at an interval of twenty years include the land in question as part of an estate, it may be presumed to have been in the plaintiff's possession as appertaining to the estate purchased at two periods separated by twenty years—*Shamlal Thakur v. Luchman Chowdhary*, I. L. R. 15 Cal. 353.

(d). Where a plaintiff claimed to be holding certain lands under two puttees, and the defendant contended that plaintiff's possession extended only to the cultivated land and not to the uncultivated plots of the said lands, but the survey map showed that the land in suit fell within plaintiff's area, and that it was distinguishable from other lands falling within the same boundaries which had been specially reserved by the talookdar : *Held*, that though the testimony of a survey map was not conclusive, it should not be disregarded unless there was clear and direct evidence to the contrary—*Prossunno Chundra Roy v. The Land Mortgage Bank of India, Ltd.*, 25 W. R. 453.

(e). In the case of *Rajah Leelanund Singh v. Rajah Mahendra Narayan Singh*, 13 W. R. (P. C.) 7, their Lordships of the Privy Council made the following observations :—" When this case came on appeal before the Sudder Dewany Adawlut, the Judges of that Court observed, as their Lordships think with great justice, that they were bound to treat the survey proceedings as correct so far as the appearance of the country is recorded therein."

(f). In the case of *Mohesh Chundra Sen v. Juggut Chundra Sen*, I. L. R. 5 Cal. 212, L. S. Jackson J. remarked : " Now I have no

doubt that in general, where the question is simply one of title, and the available evidence is proof of possession at a particular period, a survey map ought to be, and is, most cogent evidence.

**Thakbust Maps.**—(a). Thakbust maps are, as has been pointed out in many decisions of this Court, good evidence of possession, but the value of that evidence varies enormously. In the case of a thak map containing definite land-marks and undisputed boundaries signed by the parties or their accredited agents representing land which has been brought under cultivation and is in the possession of ryots whose names are known or can be discovered from the zemindary papers, a thak map is very valuable evidence of possession. But the value of such a map is greatly diminished when we find that there are natural land-marks delineated thereupon; that the land was jungle when measured; that the boundaries are not discoverable from a mere inspection of the map; and that neither the zemindars nor their agents have, by their signatures, admitted the correctness of the thak—*Joytara Dassi v. Mahomed Mobareck*, I. L. R. 8 Cal. 975.

(b). A thakbust map is not only evidence, but is very good evidence as to what the boundaries of the property were at the time of the permanent settlement, and also as to what they admittedly were at the time of the thakbust survey—*Shama Sundari Dassi v. Jogobundhu Sootar*, I. L. R. 16 Cal. 185.

(c). The thak map affords good substantial evidence of the linear distances between the successive marking points (or thaks) of the boundary lines. The map by its nature does not pretend to be anything more as regards the relative angular distances, or positions of the different points, than a sketch outline just sufficient to connect them and to indicate roughly their situations on the ground—*Mr. James Burn v. Achumbit Roy*, 20 W. R. 14.

(d). An entry in the thak map, under the head of proprietors noting the existence of a Shikmee talook in the possession of plaintiff's father's vendor to the extent of a ten-anna share, is no proof of the plaintiff's title in the Shikmee talook or of the extent of his share. The thakbust map was never intended to represent, and is, in no sense, a record of tenures subordinate to Government rent-paying estates. The column under which this entry is found is a column intended to show the names of the Government rent-paying proprietors in actual possession of the village. It was quite outside the duty of the Thakbust Ameen or Peshkar who drew up the contents of this column to notify the existence or extent of share of the proprietor of any subordinate tenure—*Mohima Chundra Roy Chowdhary v. J. P. Wise and others*, 25 W. R. 277.

(e). Thakbust maps are evidence of possession, although not conclusive as to title, and if they are evidence of possession, they are also some evidence of title—*J. G. W. Pogoss v. Mukund Chunder Sarma Sircar*, 26 W. R. 36.

(f). In a suit for possession the only evidence for the plaintiff was a thakbust map which had been signed as correct by predecessors in title of both the plaintiff and defendant, and on which the lands in dispute were laid down as the lands of the plaintiff's predecessor. *Held*, that the evidence was not sufficient to justify a decree for the plaintiff—*Mohesh Chundra Sen v. Juggut Chundra Sen*, I. L. R. 5 Cal. 212.

**Inadmissible Maps.**—Maps or plans made by Government for private purposes, or when acting in other than a public capacity, are not admissible under this section—*Junmajoy Mullick v. Dwarkanath Mytee*, I. L. R. 5 Cal. 287.

37. When the Court has to form an opinion as to the existence of any fact of a public nature, any statement of it, made in a recital contained in any Act of Parliament, or in any Act of the Governor-General of India in Council or of the Governors in Council of Madras or Bombay, or of the Lieutenant-Governor in Council of Bengal, or in a notification of the Government appearing in the *Gazette of India*, or in the *Gazette* of any Local Government, or in any printed paper purporting to be the *London Gazette* or the *Government Gazette* of any colony or possession of the Queen, is a relevant fact.

**Scope of the Section.**—"With respect to these documents it may be generally observed, that, provided they have been duly authenticated in some one of the modes stated above,\* and their

\* Sec. 78 of the Code makes provisions regarding the proof of notifications, and other official documents; sec. 57 mentions Acts, &c., of which judicial notice must be taken; and sec. 81 makes provisions as to presumptions concerning Gazettes.

contents be pertinent to the issue, they will be admissible, either as *primâ facie* or as conclusive proof of the facts directly stated in them ; and in many cases they will be received in evidence even if such matters are inserted in them by way of introductory *recital*. Thus, where certain *public statutes* recited that great outrages had been committed in a particular part of the country, and a public *proclamation* was issued, with similar recitals, and offering a reward for the discovery and conviction of the perpetrators, these were held admissible and sufficient evidence of the existence of those outrages, to support the averments to that effect in an information for a libel on the Government in relation thereto. So, a recital of a state of war, in the preamble of a public statute, is good evidence of its existence, and the war will be taken notice of without proof, whether this nation be or be not a party to it.—Taylor, sec. 1473.

Gazettes, in common with all other *newspapers*, are frequently offered in evidence, with the view of fixing an adversary with *knowledge* of certain facts advertised therein : but here it is always advisable, and sometimes necessary, unless the case is governed by a special Act of Parliament, to furnish *some* evidence, from which the jury may infer that the party sought to be affected by the notice has read it. This may be done in a variety of ways, as by proving that the person has been in the habit of taking in the Gazette or other newspapers, or has attended a reading-room where it was taken in, or has shown himself acquainted with other articles in the number containing the notice, or has evinced an unusual interest in the affairs of the partnership and the like. But it seems not enough to prove that the newspaper was circulated in the immediate neighbourhood of the person's residence.—Taylor, secs. 1478 and 1479.

Judicial notice is taken for the purpose of civil suits of the fact that a foreign state has not been recognised by Her Majesty or the Governor-General-in-Council. Sec. 431, Act XIV of 1882.

A recital in any Act of the Governor-General-in-Council of a public nature is *primâ facie* evidence of the fact recited. Act I of 1867 (Madras).

The Government Gazette containing the advertisement of sale and a printed paper purporting to be the conditions of sale alluded to in the Gazette, and issued from the Master's office in the name of the master, were admitted in evidence to prove the actual conditions of the deed of sale—*Jotendra Mohun Tagore v. Rani Brojosoondary*, W. R. (1864) 50.

In a case in which the accused was charged with abetting the waging of war against the Queen under sec. 121 of the Penal Code, it was held that the *Calcutta Gazette* and the *Gazette of India* were

admissible in evidence, under sec. 8 of Act II of 1855, to prove the proclamation and official communications of the Government relating to the war—*The Queen v. Ameerooddeen*, 15 W. R. Cr. 25.

38. When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant.

Relevancy of statements as to any law contained in law-books.

Sec. 45 makes the opinion of an expert, upon a point of foreign law, admissible in evidence.

Sec. 84 enjoins that books containing the laws of any country, and published under the authority of the Government of that country as also books purporting to contain reports of decisions of the Courts of such country, shall be presumed to be genuine.

This section is an innovation on the English Law of Evidence as it does not require that the laws and the usages and customs of foreign states, should be proved by calling professional or official persons to give their opinions on the subject. It seems to be subject to the Indian Law Reports Act XVIII of 1875.

The expression 'any country' will include India, England and foreign countries.

### *How much of a Statement is to be proved.*

39. When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, book, or series

What evidence to be given when statement forms part of a conversation, document, book, or series of letters or papers.



of letters or papers as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made.

**Reason of the Rule.**—If the rule were otherwise than what is stated in the section, the mere fact of one party putting in an extract from a document, or asking a question as to a particular statement in a conversation, would entitle the other party to have the whole document read, or to prove anything else that was said in the same conversation, and various statements which obviously ought not to be admissible, would be got in, indirectly. Mr. Taylor says:—"Though the whole of a document may at common law be read by the one party where the other has already put in evidence a partial extract, this rule will not warrant the reading of *distinct entries* in an account-book, or distinct paragraphs in a newspaper, unconnected with the particular entry or paragraph relied on by the opponent, nor will it render admissible bundles of proceedings in bankruptcy, entries in corporation-books or a series of copies of letters inserted in a letter-book, merely because the adversary has read therefrom one or more papers or entries or letters. If, indeed, the extracts put in expressly refer to other documents, these may be read also; but the mere fact that the remaining portions of the papers or books *may* throw light on the parts selected by the opposite party will not be sufficient to warrant their admission, for such party is not bound to know whether they will or not; and, moreover, the light may be a false one." In the case of a conversation, in which several distinct matters have been discussed, if a part of it is relied on as an admission, the adverse party can give in evidence only so much of the same conversation as may explain or qualify the matter already before the Court.\*

As to admissions *vide* notes to sec. 17, *ante* p. 62.

**Letters.**—(a). "With regard to letters, it has been held that a party may put in such as were written by his opponent without producing those to which they were answers, or calling for their production; because, in such a case, the letters, to which those put in were answers, are in the adversary's hands, and he may produce them, if he thinks them necessary to explain the transaction."—Taylor, sec. 734.

(b). A printed official letter from the Secretary of the Government of the Punjab to the Secretary of the Government of India was held

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\* *Vide Prince v. Samo*, 7 A. and E. 627.

to be admissible in evidence under sec. 6, Act II of 1855—*The Queen v. Amserooden*, 15 W. R., Cr. 25.

*Judgments of Courts of Justice, when relevant.*

40. The existence of any judgment, order or decree which by law prevents any Court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such Court ought to take cognizance of such suit or to hold such trial.

Previous judgments relevant to bar a second suit or trial.

**Scope of the Section.**—This section makes the existence of any judgment order or decree, a relevant fact, if such previous judgment order or decree bars a second suit or prevents the holding of a second trial. It designedly omits to deal with the question of the effect of judgments in preventing further proceedings in regard of the same matter. It has nothing to do with questions of evidence beyond the admissibility of the judgments, orders or decrees ; because a plea of *res judicata* in civil cases, of *autrefois acquit* or *autrefois convict* in criminal matters, is not a plea as a matter of evidence, but only a plea barring the action or preventing the holding of trial, as a matter of procedure as distinguished from the rules of evidence. The law upon the subject of the effect of judgments in preventing further proceedings in regard of the same matter is to be found in sections 13 and 43 of the Code of Civil Procedure and section 403 of the Code of Criminal Procedure. The cases which the Evidence Act provides for, are cases in which the judgment of a Court is in the nature of a law, and creates the right which it affirms to exist.\* Garth C. J., in the case of *Gujju Lal v. Fateh Lal*, I. L. R., 6 Cal., 171, observes :—"It is true that section 40 might have been more clearly worded. It has in fact much the same defect as section 2 of Act VIII of 1859, which was pointed out by the Privy Council in the case of *Soorjomoni Debbya v. Suddanund Mahapatter*, 12 B. L. R. 304. But I can not doubt that it was intended to include all judgments, which by law operate to prevent a Court, whether civil or criminal, from taking cognizance of a suit, or trying any particular issue. The words 'holding a trial' are amply large enough to admit of this construction. And it is not because in some other Act the words 'holding a trial' may have been construed to refer to criminal trials only, that we ought to confine their meaning in the same way in section 40 of the

\* *Vide*. Stephen's Introduction to the Evidence Act, 166.

'Evidence Act. Section 40, in my opinion, admits as evidence all judgments *inter partes*, which would operate as *res judicata* in a second suit."

**Effect of secs. 13 and 43 of the Code of Civil Procedure.**—The doctrine of *Res Judicata* is founded on the well-known principle '*nemo debet bis vexari pro eadem causa.*' If matters, which have been once solemnly denied, were to be again drawn into controversy, if facts once solemnly affirmed were to be again denied whenever the affirmant saw his opportunity, the end would never be of litigation and confusion. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. Consequently "when one or more persons have a single cause of action against one or more, the whole of the claim arising out of that cause of action must be included in a single suit. If the plaintiff, having omitted any portion, proceed to judgment and decree for the rest, he loses for ever his remedy in respect of the portion so omitted." The rule has thus been laid down in *Henderson v. Henderson* (3 Hare 100) :—"Where a given matter becomes the subject of litigation in and of adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case." The subjects of *res judicata*, *autrefois acquit* and *autrefois convict* are properly regulated by the provisions of the Codes of Civil and Criminal Procedure. But as these subjects have been considered by the annotators of the Evidence Act, in connection with this section, the leading cases explaining the principles of the rules prescribed by these Codes, are noted below. In this connection it is necessary to remark that it is an approved rule of law that (except in the case of judgments *in rem* and judgments relating to matters of a public nature, which are governed by a different principle) no man ought to be bound by the decision of a Court of Justice, unless he, or those under whom he claims, were parties to the proceeding in which it was given. *Vide* notes under sections 11 and 13, *ante*.

**Principle of Res Judicata.**—Chief Justice DeGrey laid down, in the *Duchess of Kingston's case* (2 Smith's leading cases 424), the

general rule. He said : " It is certainly true as a general principle that a transaction between two parties in judicial proceedings ought not to be binding upon a third ; for it would be unjust to bind any person who could not be admitted to make a defence or to examine witnesses, or to appeal from a judgment which he might think erroneous ; and therefore the depositions of witnesses in another cause in proof of a fact, the verdict of a jury finding the facts and the judgment of the Court upon the facts found, although evidence against the parties and all claiming under them, are not, in general, to be used to the prejudice of strangers. There are some exceptions to this general rule, founded upon particular reasons ; but, not being applicable to the present subject, it is unnecessary to state them. From a variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true : *first*, that the judgment of a Court of concurrent jurisdiction, directly upon the point is, as a plea, a bar or as evidence, conclusive between the same parties, upon the same matter, directly in question in another Court ; *secondly*, that the judgment of a Court of exclusive jurisdiction directly upon the same point is, in like manner, conclusive upon the same matter between the same parties, coming incidentally in question in another Court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment." The principle laid down in the above case is not inconsistent with the law of our country. In the case of *Khagauli Singh v. Hussein Bux Khan*, 15 W. R. (P. C.) 30, their Lordships of the Privy Council said : " There is nothing technical nor peculiar to the law of England in the rule so stated. It was recognised by the civil law, and it is perfectly consistent with the second section of the Code of the Procedure under which this case was tried."

**Conditions, necessary to constitute Res Judicata.**—In order to have the effect of *res judicata*, it is necessary : (A) That the matter, directly and substantially in issue in the second suit or issue, must be the same matter which was *directly and substantially* in issue, in the former suit ; (B) That the former suit must have been a suit between the same parties or between parties under whom they or any of them claim, litigating under the same title ; (C) That the Court which decided such former suit must have been a Court of Jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised ; and (D) That such matter must have been heard and finally decided by such Court.

**A. The matter in the two suits must be the same.**—"In order to exclude a party whose demand has been dismissed, from making a fresh demand, on the ground that the matter is *res judicata*, the thing demanded must be the same. But this must not be understood too literally. For instance, although the flock which the plaintiff demands now does not consist of the same sheep as it did at the time of the former demand, the demand is held to be for the same thing, and therefore not receivable. And so a party is held to demand the same thing, when he demands anything which forms a part of it."—Best, 8th Ed., 545.

**I. Cause of Action.**—The term 'cause of action' is to be construed with reference rather to the substance than to the form of action. It should not be taken in its literal and most restricted sense. *Vide*—

- (a). *Surjamani Davi v. Sadanand Mohapatro*, 20 W. R. 377.
- (b). *Krishnabehari Rai v. Brajeswari Chowdhrani*, I. L. R. 1 Cal. 144.
- (c). *Laji Lal v. Hardey Narayan*, I. L. R. 9 Cal. 105.
- (d). *Abdul Kadir v. The East Indian Railway Co.*, I. L. R. 1 Mad. 375.
- (e). *Durga Persaud Singh v. Durga Kunwari*, I. L. R. 4 Cal. (P. C.) 190.

**II. Cases in which the Claim was held to be the same.**—*Vide*—

- (a). *Periya Odaya Taver v. Katama Natchiar*, 11 Moo. I. A. 50.
- (b). *Umatara Debi v. Annapurna Dasi*, 18 W. R. (P. C.) 163.
- (c). *Surjamani Devi v. Sadanand Mohapatro*, 20 W. R. (P. C.) 377.
- (d). *Krishna Bihari Rai v. Brajeswari Chowdhrani*, I. L. R. 1 Cal. 144.

**III. Judgment upon a matter not directly and substantially, but collaterally or incidentally in issue in a previous suit is no bar to a second suit.**—*Vide*—

- (a). *Raghuram Biswas v. Ram Chundra Dhobi*, W. R. (F. B.) 127.
- (b). *Balak Tewari v. Kausil Mir*, I. L. R. 4 All. 491.
- (c). *Amuseyabhai v. Sakharam Pandurang*, I. L. R. 7 Bom. 464.
- (d). *Jamaitunnissa v. Lutfunnissa*, I. L. R. 7 All. 606.
- (e). *Nanda Lal Bhattacharji v. Bidhumukhi Debi*, I. L. R. 13 Cal. 17.
- (f). *Magundeo v. Mahadeo Singh*, I. L. R. 18 Cal. 647.

**IV. Matter directly and substantially in issue is a bar to a subsequent suit.—***Vide—*

- (a). *Palwan Sing v. Risal Sing*, I. L. R. 4 All. 55.
- (b). *Nirman Sing v. Phulman Sing*, I. L. R. 4 All. 65.
- (c). *Wilaiji Begum v. Nur Khan*, I. L. R. 5 All. 514.
- (d). *Jeolal Sing v. Surfan*, 11 C. L. R. 483.
- (e). *Rakhaldas Sing v. Hiramati Dasi*, 22 W. R. 282.
- (f). *Hari Behari Bhagbat v. Pavgan Akir*, I. L. R. 19 Cal. 656.
- (g). *Naba Durga Dassi v. Feiz Buksh Chowdhari*, I. L. R. 1 Cal. 202.
- (h). *Mohim Chundra Mozumdar v. Asradha Dasi*, 15 B. L. R. 251.
- (i). *Mahes Chundra Bandpadhya v. Jaikissen Mukharji*, 15 B. L. R. 248.
- (j). *Basan Lal Sukal v. Chundi Das*, I. L. R. 4 Cal. 686.
- (k). *Belchambers v. Ashutosh Dhar*, 7 C. L. R. 308.
- (l). *Samarupuri v. Skanmuga*, I. L. R. 5 Mad. 47.
- (m). *Raja of Pillagur v. Backi Sittaya Garu*, I. L. R. 8 Mad. 219.
- (n). *Venkataraddi Appa Rau v. Peda Venkayamma*, I. L. R. 10 Mad. 15.
- (o). *Ram Chundra Singh v. Madhukumari*, I. L. R. 12 Cal. 484.
- (p). *Vishnu Chintaman v. Balaji bin Raghuji*, I. L. R. 12 Bom. 352.
- (q). *Radhamadhar Haldar v. Manohar Mukherji*, I. L. R. 15 Cal. 756.
- (r). *Troylukhanath Singh v. Protap Narain Singh*, I. L. R. 15 Cal. 808.
- (s). *Kamini Debi v. Ashutosh Mukherji*, I. L. R. 16 Cal. 103.
- (t). *Ananta Butacharya v. Damodhar Makond*, I. L. R. 13 Bom. 25.
- (u). *Bal Kissen v. Kishan Lal*, I. L. R. 11 All. 148.
- (v). *Gopinath Chobe v. Bhagwat Prasaud*, I. L. R. 10 Cal. 697.
- (w). *Chhagan Lal v. Bapu Bhai*, I. L. R. 5 Bom. 68.
- (x). *Dulabh Vahuji v. Bansidhar Rai*, I. L. R. 9 Bom. 111.
- (y). *Gauri Koer v. Andh Koer*, I. L. R. 10 Cal. 1087.

**V. Cases in which matter of the second suit was held not identical with matter of the first suit.—Vide—**

- (a). *Sami Achari v. Soma Sundram Achari*, I. L. R. 6 Mad. 119.
- (b). *Periandi v. Angappa*, I. L. R. 7 Mad. 423.
- (c). *Karutha Sami v. Jaganatha*, I. L. R. 8 Mad. 478.
- (d). *Ram Chundra Chowdhari v. Kashi Mohan*, 21 W. R. 57.
- (e). *Mani Rai v. Rajbansi Koer*, 25 W. R. 393.
- (f). *Kali Krishna Tagore v. Secretary of State for India*, I. L. R. 16 Cal. 173.
- (g). *Moro Abaji v. Narayan Dhonbhat Petre*, I. L. R. 11 Bom. 355.
- (h). *Shridhar Vinayak v. Narayan Babaji*, 11 Bom. H. C. Rep. 224.
- (i). *Girdhar Manordas v. Dayabhai Kolabhai*, I. L. R. 8 Bom. 174.
- (j). *Nilo Ram Chundra v. Gorind Ballal*, I. L. R. 10 Bom. 24.
- (k). *Dataram v. Ramkristo*, 9 W. R. 594.
- (l). *Kadir Buks v. Ghulam Ali Gemasta*, 9 W. R. 90.
- (m). *Khaerunissa Bibi v. Budhi Bibi*, 13 W. R. 317.
- (n). *Sadaruddin Ahamed v. Beni Madhav Rai*, I. L. R. 15 Cal. (F. B.) 145.
- (o). *Amir Zama v. Nathumal*, I. L. R. 8 All. 396.
- (p). *Ramanugra Narayan v. Mahasundar Kunwar*, 12 B. L. R. 433.
- (q). *Konerrav v. Gurrao*, I. L. R. 5 Bom. 589.
- (r). *Ratan Rai v. Hanuman Das*, I. L. R. 5 All. 118.
- (s). *Ahamed Hossein Khan v. Nihaluddin Khan*, I. L. R. 9 Cal. 945.
- (t). *Govind Chundra Adya v. Afzal Rubbani*, I. L. R. 9 Cal. 426.
- (u). *Amanat Bibi v. Imdad Hossein*, I. L. R. 15 Cal. 800.
- (v). *Falmabhai v. Aishabhai*, I. L. R. 13 Bom. 242.

**VI. Matter must have been alleged and denied or admitted.—Vide—**

- (a). *Shama Churn Chatterji v. Prasanno Kumar Santikari*, 5 C. L. R. 251.
- (b). *Sheo Ratan Singh v. Sheo Sahai Mir*, I. L. R. 6 All. 358.
- (c). *Sheoraj Rai v. Kashi Nath*, I. L. R. 7 All. 247.

**VII. Matter which might have been made ground for defence or attack in the former suit is res judicata in subsequent suit.—**  
*Vide—*

- (a). *Umatara Debi v. Annapurna Dasi*, 18 W. R. 163.
- (b). *Radhia v. Beni*, I. L. R. 1 All. 560.
- (c). *Kashikissen Rai Chowdhuri v. Kristo Chundra Sandyal Chowdhuri*, 22 W. R. 464.
- (d). *Dinabandhu Chowdhuri v. Kristomani Dasi*, I. L. R. 2 Cal. 152.
- (e). *Devray Krishna v. Halambhai*, I. L. R. 1 Bom. 87.
- (f). *Baldeo Sahai v. Bateshar Singh*, I. L. R. 1 All. 75.
- (g). *Maktam Valad Mohidin v. Emam Valad Mohidin*, 10 Bom. H. C. Rep. 293.
- (h). *Mahabir Prasad Singh v. Maenaghten*, I. L. R. 16 Cal. 682.
- (i). *Chenvirappa v. Puttappa*, I. L. R. 11 Bom. 708.

But see—

- (a). *Allunni v. Kunjusha*, I. L. R. 7 Mad. 264.
- (b). *Shoo Ratan Singh v. Shoo Sahai Mier*, I. L. R. 6 All. 358.
- (c). *Kandunni v. Katramma*, I. L. R. 9 Mad. 251.

**B. I.—A decision for or against a man in one capacity will not have the force of a res judicata for or against him when suing or sued in a wholly different capacity, and in fact as a different person in law.—***Vide—*

- (a). *Raj Kanwar v. Inderjit Kanwar*, 13 W. R. 52.
- (b). *The Zamindar of Pittapuram v. The Proprietors of the Mutta of Kolanka*, I. L. R. 2 Mad. 23.
- (c). *Durga Churn v. Kashi Chundra Moitra*, Marsh. Rep. 539.
- (d). *Rudr Narain Shingh v. Rup Kuar*, I. L. R. 1 All. 734.
- (e). *Wahid Ali v. Jumarji*, 3 B. L. R. (F. B.) 74. Affirmed by the Privy Council, 18 W. R. 185.

**II.—A lessor cannot be held to claim under his own lessee :—**

- (a). *Rambrahmo Chakrabutty v. Bansi Karmakar*, 11 C. L. R. 122.
- (b). *Brojo Behari Mitra v. Kedar Nath Mozumdar*, I. L. R. 12 Cal. 58.

**III.—Reversionary heirs are, in the absence of fraud or collusion, bound by judgments obtained against Hindu widows—**

- (a). *Kattama Nachair v. Periya Odaya Taver (The Skiraganga case)* 2 W. R. (P. C.) 31.



- (b). *Nabin Chundra Chuckerbutti v. Ishar Chundra Chuckerbutti*, 9 W. R. (F. B.) 505.
- (c). *Nand Kumar v. Radha Kuari*, I. L. R. 1 All. 282.
- (d). *Jotindra Mohan Tagore v. Jugal Kisor*, 9 C. L. R. 57.
- (e). *Protap Narain Singh v. Trailekhyanath Singh*, I. L. R. 11 Cal. 186.
- (f). *Sanikumar v. Deo Saran*, I. L. R. 8 All. 365.
- (g). *Sachit v. Budhua*, I. L. R. 8 All. 429.

**IV.—A judgment obtained in a suit against one co-sharer is not binding on another co-sharer.—Vide—**

- (a). *Hasir Ghasi v. Sonamani Dasi*, I. L. R. 6 Cal. 31.
- (b). *Kunnathurillath Nambadri v. Narayanan Nambadri*, I. L. R. 6 Mad. 121.

**V.—Interested parties bound by decisions in suits brought by them in the names of their benamidars.—Vide—**

- (a). *Bhawal Singh v. Rajendra Pratap Sahi*, 5 B. L. R. 321.
- (b). *Zhub Chand v. Narain Singh*, I. L. R. 3 All. 812.
- (c). *Gopi Nath Chobe v. Bhagwat Prasad*, I. L. R. 10 Cal. 697.
- (d). *Shaugar v. Krishnan*, I. L. R. 15 Mad. 267.

**G. I.—Concurrent Jurisdiction.**—It means concurrent as regards the pecuniary limit as well as the subject-matter. By Court of competent jurisdiction is meant a Court which has jurisdiction over the matter in the subsequent suit in which the decision is used as conclusive, or in other words, a Court of concurrent jurisdiction—*Vide—*

- (a). *Misir Raghubur Dial v. Sheebutsch Singh*, I. L. R. 9 Cal. 439.
- (b). *Sheoraj Rai v. Kashinath*, I. L. R. 7 All. 247.
- (c). *Ranbhadur Singh v. Lacho Koer*, I. L. R. 11 Cal. 301.

**II.—Consent of parties will not give to a Court a jurisdiction which it does not otherwise possess.—Vide—**

- (a). *Bhupendra Nath Chowdhuri v. Kali Prosunne Ghosh*, 24 W. R. 205.
- (b). *The Government of Bombay v. Rznmal Singji Amar Singji*, 9 Bom. H. C. Rep. 242.
- (c). *Kadambini Dasi v. Durga Charan Dutt*, Marsh. Rep. 4.
- (d). *Queen v. Bholanath Sen*, I. L. R. 2 Cal. 24.

**III.**—If the Court which tried the first suit, was competent to try the subsequent suit, if then brought, the decision of such Court would be conclusive, although on a subsequent date by a rise in the value

of such property, or from any other cause, the said Court ceased to be the proper Court so far as pecuniary jurisdiction is concerned, to take cognizance of a suit relating to the property—*Gopinath Chobe v. Bhagwat Prasad*, I. L. R. 10 Cal. 697. Refer to *Raghunath Panjah v. Issar Chundra Chowdhari*, I. L. R. 11 Cal. 153.

**IV.—Revenue Courts.**—A Revenue Court is not a Court of concurrent jurisdiction with the Civil Court and is not competent to determine finally a question of title, and therefore its judgment does not render the matter decided by it, *res judicata*—*Hari Sankar Mukerji v. Muktarām Patro*, 24 W. R. 154. Refer also to—

- (a). *Shumbhu Narain Singh v. Bachcha*, I. L. R. 2 All. 200.
- (b). *Hussain Shah v. Gopal Rai*, I. L. R. 2 All. 428.
- (c). *Debi Prasad v. Jafar Ali*, I. L. R. 3 All. 40.
- (d). *Gopal Rai v. Uchabal*, I. L. R. 3 All. 51.
- (e). *Muhammed Abu Jafar v. Wali Muhammed*, I. L. R. 3 All. 81.
- (f). *Sukhdait Mir v. Karim Chowdhari*, I. L. R. 3 All. 521.
- (g). *Radha Prasad Singh v. Salik Rai*, I. L. R. 5 All. 245.
- (h). *Totaram v. Harkishan*, I. L. R. 7 All. 224.
- (i). *Raj Bahadur v. Birkma Singh*, I. L. R. 3 All. 85.
- (j). *Gunga Prasad v. Baldeo Ram*, I. L. R. 10 All. 347.
- (k). *Harika Ramayyar v. Sri Vidya Sri Sindhu Tirtasami*, I. L. R. 7 Mad. 61.
- (l). *Mutta Kumarappa Reddi v. Arumuga Pillai*, I. L. R. 7 Mad. 145.

**D. I.—Matter must have been heard and finally decided.**—*Vide*—

- (a). *Chandra Sikhar Deb Rai v. Durgendra Deb*, 3 W. R. 39.
- (b). *Saikappa Chetti v. Kulanda Ruri Natchair*, 3 Mad. H. C. Rep. A. J. 84.
- (c). *Kameswar Persaud v. Rajkumari Rattankar*, I. L. R. 20 Cal. 99.

**II.—When the matter had not been literally determined in the previous suit it is no *res judicata*.**—*Vide*—

- (a). *Kanai Lal Khan v. Saahi Bhusan Biswas*, I. L. R. 6 Cal. 777.
- (b). *Pannu Singh v. Nirghin Singh*, I. L. R. 7 Cal. 1298.
- (c). *Ramreddi v. Subareddi*, I. L. R. 12 Mad. 500.

**III.—An opinion expressed incidentally and not amounting to a finding upon a distinct issue is not a final determination of the matter in question.**—*Vide*—

- (a). *Sibnath Chatterji v. Naba Kissen Chatterji*, 21 W. R. 189.
- (b). *Devara Kanda Narasamma v. Debara Kanda Kanya*, I. L. R. 4 Mad. 134.

**IV.—The matter is not res judicata, if the first suit failed on account of some technical defect, and there was no decision whatever on the merits.—Vide—**

- (a). *Lusman Dada Naik v. Ram Chandra Dada Naik*, I. L. R. 5 Bom. 48.
- (b). *Putale Maheti v. Tulja*, I. L. R. 3 Bom. 223.
- (c). *Sukhi Bewa v. Mehadi Mondal*, 9 W. R. 327.
- (d). *Razmnath Rai Chowdhari v. Bhagbat Mahapatro*, 3 W. R. Act X 140.
- (e). *Rungrav Rarji v. Sidhi Mahomed Ebrahim*, I. L. R. 6 Bom. 482.
- (f). *Dullabh Jogi v. Narain Lakhi*, 4 Bom. H. C. Rep. A. C. 110.
- (g). *Mahomed Salim v. Nabian Bibi*, I. L. R. 8 All. 282.
- (h). *Ram Sewak Singh v. Nakchad Singh*, I. L. R. 4 All. (F. B.) 261.
- (i). *Jibanti Nath Khan v. Sibnath Chuckerbutti*, I. L. R. 8 Cal. 819.
- (j). *Kamala Kamini Debya v. Lokenath Kar*, 11 C. L. R. 183.
- (k). *Futeh Singh v. Latchmi Koer*, 21 W. R. 103.
- (l). *Tilakdhari Singh v. Bessandra Narain Sahi*, Marsh. 418.

**V.—Matter decided by Court of first instance or by the lower Appellate Court, but not decided by the last Court of Appeal has been held not to have been heard or finally decided.—Vide—**

- (a). *Gunga Bissen Bhagat v. Raghunath Ojha*, I. L. R. 7 Cal. 381.
- (b). *Imamudin v. Futeh Ali*, 3 C. L. R. 447.
- (c). *Mukund Narain Deo v. Jonardan De Barnik*, 15 W. R. 208.
- (d). *Chundra Kumar Mitra v. Sib Sundari Dasi*, I. L. R. 8 Cal. 631.
- (e). *Nilvaru v. Nilvaru*, I. L. R. 6 Bom. 110.

**VI.—A dismissal for want of jurisdiction is no res judicata.—Vide—**

- (a). *Mahabir Singh v. Ram Bhajjan Sah*, I. L. R. 16 Cal. 545.
- (b). *Ram Govind Jha v. Mangar Ram Chowdhari*, 13 C. L. R. 83.
- (c). *Girish Chundra Mukherji v. Rammessari Debi*, 22 W. R. 308.
- (d). *Bansi Singh v. Sadist Lal*, I. L. R. 7 Cal. 739.

**VII.—The subject-matter of a claim dismissed because the plaintiff had adduced no evidence is *res judicata* in a subsequent suit.—*Vide*—**

- (a). *Rama Rao v. Suriya Rao*, I. L. R. 1 Mad. 84.
- (b). *Venkatachalam v. Mahalakshamma*, I. L. R. 10 Mad. 272.
- (c). *Sahadeo Pande v. Nokhid Pande*, 15 W. R. 57.
- (d). *Mafizuddin v. Amuddin*, 23 W. R. 57.
- (e). *Kartick Chundra Pal v. Sridhar Mandal*, I. L. R. 12 Cal. 563.
- (f). *Watson v. The Collector of Rajshahi*, 13 Moo. I. A. 170.

**VIII.—Relief claimed in plaint, and not expressly granted by the decree, cannot be claimed in a subsequent suit.—*Vide*—**

- (a). *Thyila Kandi Ummatha v. Thyila Kandi Cheria Kunhamed*, I. L. R. 4 Mad. 308.
- (b). *Sukh Lal v. Bhikki*, I. L. R. 11 All. 190.
- (c). *Fatmabai v. Aishabai*, I. L. R. 13 Bom. 242.

**IX.—*Ex parte* Decree.—**(a). An *ex parte* decree for arrears of rent does not operate so as to render the question of the rate of rent *res judicata* between the parties—*Madhusudan Saha Mondal v. Brae*, I. L. R. 16 Cal. (F. B.) 300.

(b). An *ex parte* decree is *prima facie* for the purposes of evidence as good as any other decree, and as binding between the parties upon the matter decided by it. But if the party against whom it was passed could show that the decree was obtained by fraud, or that it was irregular or contrary to natural justice, or the like, the *ex parte* decree, although of force between the parties in the suit in which it was given, might be properly considered as of no value for the purpose of evidence in any other suit—*Bir Chundra Manickya v. Harris Chundra Dass*, I. L. R. 3 Cal. 383.

(c). In a personal action, a decree pronounced *in absentem* by a Foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by International law an absolute nullity—*Gurudoyal Singh v. Raja of Faridkot*, I. L. R. 22 Cal. (P. C.) 222.

**Miscellaneous.—*Vide*—**

- (a). *Gnanambal v. Parrathi*, I. L. R. 15 Mad. 477.
- (b). *Nabin Chundra Majumdar v. Mukta Sundari Dabya*, 7 B. L. R. App. 38.
- (c). *Price v. Kholat Chundra Ghose*, 5 B. L. R. App. 50.

- (d). *Brojo Behari Mitra v. Kedarnath Majumdar*, I. L. R. 12 Cal. 580.
- (e). *Ram Chundra Narayan v. Narayan Mahadeb*, I. L. R. 11 Bom. 216.
- (f). *Vengataraghava v. Rangamma*, I. L. R. 15 Mad. 493.
- (g). *Brahmamoi Dasi v. Anand Chundra Chatterji*, 22 W. R. 120.
- (h). *Bholabhai v. Adesang*, I. L. R. 9 Bom. 75.
- (i). *Kanai Lal Singh v. Sashi Bhusan Biswas*, 8 C. L. R. 117.
- (j). *Ram Narain v. Bisheshar Prosad*, I. L. R. 10 All. 411.
- (k). *Ali Moidin Raghuthan v. Elyachanidathil Kombi Achen*, I. L. R. 5 Mad. 239.
- (l). *Narain Gop Habbu v. Pandurang Ganu*, I. L. R. 5 Bom. 685.
- (m). *Sukh Nandan v. Rennick*, I. L. R. 4 All. 192.
- (n). *Golap Chand v. Prossuno Cumari Debi*, 20 W. R. 463 (on appeal 23 W. R. 253).
- (o). *Radhabhai v. Anantrav Bhagwant Deshpande*, I. L. R. 9 Bom. 198.
- (p). *Kamini Debi v. Ashutosh Mukerji*, 16 Cal. (P. C.) 103.
- (q). *Venkayya v. Suramma*, I. L. R. 12 Mad. 235.
- (r). *Madhavan v. Kesharan*, I. L. R. 11 Mad. 191.
- (s). *Shwapa v. Dod Nagaya*, I. L. R. 11 Bom. 114.
- (t). *Hurry Behary Bhagbut v. Paran Ahir*, I. L. R. 19 Cal. 656.
- (u). *Bakshi v. Nisamuddi*, I. L. R. 20 Cal. 505.
- (v). *Chuckanlal Roy v. Mohun Roy*, I. L. R. 20 Cal. 906.

**Rulings under sec. 43, Civil Procedure Code.**—Suit to include whole claim.—*Vide*—

- (a). *Cassom Jooma v. Thucker Liladhar Kissowji*, I. L. R. 2 Bom. 570.
- (b). *Mackintosh v. Gill*, 20 W. R. 358.
- (c). *Rukmini Koer v. Ram Tohal Rai*, 21 W. R. 223.
- (d). *Lockman Sahai v. Ramsaran Pandeyain*, 20 W. R. 144.
- (e). *Ukhs v. Daga*, I. L. R. 7 Bom. 182.
- (f). *Sheo Sankar Sahai v. Hridai Narayan*, I. L. R. 9 Cal. 143.
- (g). *Benarsi Das v. Bhikari Das*, I. L. R. 3 All. 717.
- (h). *Basur Rahim v. Shamsunnissa Begam*, 8 W. R. (P. C.) 12.
- (i). *Venkanna v. Aitamma*, I. L. R. 12 Mad. 183.

**Foreign Judgment.**—"The principles on which foreign judgments are enforced in English Courts as stated by Parke B. in *Russell v. Smyth* (9 M. and W. 810) and repeated by him in *Williams v. Jones*

(13 M. and W. 633) are declared by Blackburn J. in *Schibasy v. Westenholz* (L. R. 6 Q. B. 155) as follows: 'The judgment of a Court of competent jurisdiction over the defendant imposes on him a duty or obligation to pay the sum for which the judgment is given which the Courts in this country are bound to enforce,' but 'anything which negatives that duty or forms a legal excuse for not performing it is a defence to the action.' All jurisdiction is properly territorial. Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory, while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory, and it may be exercised over moveables within the territory; and, in questions of *status* or succession governed by domicile, it may exist as to persons domiciled, or who when living were domiciled, within the territory. As between different provinces under one sovereignty (e.g., under the Roman Empire) the legislation of the sovereign may distribute and regulate jurisdiction; but no territorial legislation can give jurisdiction which any Foreign Court ought to recognize against foreigners who owe no allegiance or obedience to the Power which so legislates.\* It will be noticed that it is an indispensable condition that the foreign Court should have jurisdiction over the defendant. It has jurisdiction over the defendant if he was, at the time the suit was commenced, a subject of the foreign country. In respect of the transactions of a joint stock company formed for the purpose of carrying on business in a foreign country, the Courts of that country may have jurisdiction under certain circumstances, though the members may never have resided therein nor owe allegiance thereto. But a foreigner, although he may not owe allegiance to a country or be under the jurisdiction of its Courts, may nevertheless equitably estop himself from pleading that the Courts of that Country had not jurisdiction over him.

(a). In suing as a plaintiff in the Court of a country to which he owes no allegiance, he has voluntarily submitted to its jurisdiction, and cannot afterwards object to the validity of the judgment of the Court on the ground that it had no jurisdiction over him—*Nal-latambi Mudaliar v. Punnuswami Pillai*, I. L. R. 2 Mad. 400. Compare *Parry & Co. v. Appasami Pillai*, I. L. R. 2 Mad. 407.

(b). A person is bound by the judgment passed by a foreign Court against him as representative of his father, and is personally bound

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\* *Vide Gurudyal Singh v. Raja of Faridkot*, I. L. R. 22 Cal. (P. C.) 238.

to pay all costs awarded against him; but in giving effect to the foreign decree, it is to be executed according to the rules of the Civil Procedure Code, which, in the absence of proof of assets received by a representative of a deceased, only gives a decree against the defendant as representative to be levied from the assets of the deceased—*Kandasami Pillai v. Moidin Saib*, I. L. R. 2 Mad. 337. See also *Bababhat v. Narharbhat*, I. L. R. 13 Bom. 224.

(c). An *ex parte* judgment of a French Court against a native of British India not residing in French territory upon a cause of action which arose in British India, imposes no duty on the defendant to pay the amount decreed so as to bar a suit in British India—*Hinde & Co. v. Ponnatu Bruyan and others*, I. L. R. 4 Mad. 359.

(d). A obtained a decree against B and C in Ceylon, and having realised a portion of the decreed amount by sale of property in Ceylon, brought a suit for the balance upon the foreign judgment against B, C, D, E, F and G, alleging that they were all members of one firm. It was held that he could not sue D, E, F and G, upon the foreign judgment; and if his intention was to sue them on the original cause of action, and B and C on the foreign judgment, the suit was bad for misjoinder—*Lakshmanan Chetti v. Karuppan Chetti*, I. L. R. 6 Mad. 273.

(e). A sued B, who resided in British India, upon a bond, and obtained a decree within the territory of a Native State. Having obtained part satisfaction of this decree, A sued B for the balance in a Court in British India upon the judgment of the Court of the Native State. It was held that the decree of the Court of the Native State was made with jurisdiction, and that the suit in the Court in British India could be maintained—*Kaligugam Chetti v. Chokalinga Pillai*, I. L. R. 7 Mad. 105.

(f). A sued B in a British Court and obtained a decree. He then sued on that decree in a Native Court of Gwalior. During the pendency of the suit, the town in which the suit had been instituted was ceded to the British Government. It was held that the suit, though it could not have been maintained, if instituted in a Court of British India, being an action on a judgment of a Court of British India, was a good and maintainable action in the Court in which it had been instituted, and was not barred by sec. 13 of the Civil Procedure Code—*Saloni v. Harlal*, I. L. R. 10 All. 517.

(g). In the case of *Bhabani Sankar v. Shevakram*, I. L. R. 6 Bom. 293, it was decided that a suit upon the judgment of a Court of a Native State is not maintainable in a Court in British India, and

that the only mode by which the decree of such a Native Court can be enforced, is, that provided by sec. 434 of the Code of Civil Procedure. See also *Fakiruddin Mahomed Assan v. The Official Trustees of Bengal*, I. L. R. 7 Cal. 82.

**Autrefois Acquit and Autrefois Convict.**—Sec. 403 of the Criminal Procedure Code lays down the rule that a person who has been formally tried by a Court of competent jurisdiction, for an offence and convicted or acquitted shall not be liable to be tried again for the same offence, and prescribes the conditions necessary to make such a plea a good one.

(a). The composition of an offence under sec. 345, Cr. P. C., has the effect of an acquittal.

(b). A dismissal of a complaint after a charge has been framed amounts to an acquittal—*In re Jadubar Mookerji*, 5 C. L. R. 359. See also *Empress v. Gurdu*, I. L. R. 3 All. 129; *Verankutti v. Chiyanne*, I. L. R. 7 Mad. 557; *Empress v. Erramreddi*, I. L. R. 8 Mad. 296; *Empress v. Gustadji Burjorji*, I. L. R. 10 Bom. 181.

(c). Where a conviction has been had on one or more of several charges, the withdrawal of the remaining charges under sec. 240, Cr. P. C., has the effect of an acquittal on such charges unless the conviction be set aside. See *Luchi Behara v. Nityanand Dass*, 19 W. R. Cr. 55.

(d). A withdrawal from the prosecution by a Public Prosecutor, with the consent of the Court in cases tried by Jury, if made after charge, amounts to an acquittal.

(e). There can be no acquittal unless the Court before which the accused is tried has jurisdiction—*Vide Rami Reddi v. Sheshu Reddi*, I. L. R. 3 Mad. 48; *Empress v. Hussain Girbu*, I. L. R. 8 Bom. 307; sec. 530, Criminal Procedure Code.

(f). The confinement of a man on political grounds under a warrant issued under the provisions of Bengal Regulation III of 1818, is not a bar to a prosecution under the regular criminal law for offences charged to have been committed before such confinement—*The Queen v. Amir Khan*, 17 W. R. Cr. 15.

41. A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person

Relevancy of certain judgments in probate, &c., jurisdiction.



any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.

Such judgment, order or decree is conclusive proof—

that any legal character which it confers accrued at the time when such judgment, order or decree came into operation ;

that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person ;

that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease ;

and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property.

**Scope of the Section.**—This section adopts the statement of the law by Sir Barnes Peacock, in the well-known case of *Kanhya Lal v. Radhacharan*, 7 W. R. 339. The Select Committee in their report on the Evidence Act said as follows :—"For the sake of simplicity, and in order to avoid the difficulty of defining or enumerating judgments *in rem*, we have adopted the statement of the law by Sir Barnes Peacock in *Kanhya Lal v. Radhacharan*, 7 W. R. 339." The general rule of law is that judgments are conclusive only against the parties and those who claim under them, and the said rule is founded upon the well-known

maxim of the civil law, '*Res inter alios acta alteri nocere non debet*,' (a matter transacted between one set of persons ought not to injure or affect another person).<sup>1</sup> This rule is subject to certain exceptions which are the offspring of positive law, and the reason for the exceptions is that the nature of the proceedings by which there is a fictitious though generally not unjust extension of parties, renders it proper to use the judgment against those not formally parties as all the world is supposed to be a party to such a judgment. Consequently, this section admits judgments, which are technically called judgments *in rem*, as evidence in all subsequent suits upon matters mentioned in the section and are treated as conclusive, as against all persons whatever, whether parties, privies or strangers to the case, of all facts in issue and all facts which must have been assumed true to warrant rendition of the judgment. It applies to judgments which confer or take away a legal character, or declare a person to be entitled to such character, or to be entitled to any specific thing absolutely. These judgments are conclusive. The section describes what are commonly known as judgments *in rem*, but it goes beyond what is strictly a judgment *in rem*, and the words used ought to be carefully looked at in considering what judgments are within this section.\*

**Judgment.**—By the term judgment is understood the final judgment, order or decree of any Court. The probative force of a judgment considered as proof of the matters thereby decided varies as such judgment is,—1st—A judgment *in rem* or 2nd—A judgment *in personam*.

**Judgment in rem.**—It is an "adjudication pronounced upon the status of some particular subject-matter, by a tribunal having competent authority for that purpose. Such judgments the law has, from motives of policy and general convenience, invested with a conclusive effect against all the world. At the head of these, stand judgments in the Exchequer, of condemnation of property as forfeited, adjudications of a Court of admiralty on the subject of prize, &c. In certain instances, also, judgments as to the status or condition of a party are receivable in evidence against third parties, although they are not conclusive. Thus, in an action against an executor sued on a bond of his testator, a commission finding the testator lunatic at the time of the execution of the bond, is *prima facie* evidence against the plaintiff though he was no party to it. And by analogy to the general rule of *res inter alios acta*, judgments and judicial proceedings *inter alios* are receivable on questions of a public nature, and in other cases where the ordinary rules of evidence are departed from."—Best, 8th Ed., 546.

\* Vide *Neamat Ali v. Gooroo Das*, 22 W. R. 365.

In the case of *Gungadhar Rai v. Umasondary Dassi*, 7 W. R. 347, Markby J. observed : " By a judgment *in rem* is meant a judgment binding against all the world ; the words *in rem* being a phrase borrowed by modern civilians from the Roman law and signifying general as opposed to special.... A judgment *in rem* no more means a judgment of or concerning a thing than *ius in rem* means a right of or concerning a thing : in both expressions the words *in rem* have precisely the same meaning, and which may be best paraphrased by the words ' availing against the world.'

The following extracts from the decision of Sir Barnes Peacock C. J. in the case of *Kankya Lal v. Radhacharn*, 7 W. R. 339, will give a clear view of the matter :—

" According to the Civil Law a suit in which a claim of ownership was made against all other persons, was an action *in rem* and the judgment pronounced in such action was a judgment *in rem* and binding upon all persons whom the Court was competent to bind ; but if the claim was made against a particular person or persons, it was an action *in personam*, and the decree was a decree *in personam*, and binding only upon the particular person or persons against whom the claim was preferred or persons who were privies to them. This will be made more clear by referring to the note of Mr. Sanders upon sec. 1, Book 4, Tit. 6, of the Institutes of Justinian. He says : " The first and most important division of actions is that into actions *in rem* and actions *in personam*, by the first of which we assert a right over a thing against all the world, by the second, we assert a right against a particular person : and, accordingly speaking technically, an action was called real when the formula, in which it was conceived embodied a claim to a thing without saying from whom it was claimed ; and personal, when the formula, stated upon whom a claim was made." In para. 61 of the Introduction, Mr. Sanders says : " His special interests prompt each man to claim, as against his fellows, an exclusive interest in particular things. Sometimes such a claim, sanctioned by law, is urged directly ; the owner, as he is said to be of the thing, publishes this claim against all other men and asserts an indisputable title, himself to enjoy all the advantages which the possession of the thing can confer. Sometimes the claim is more indirect. The claimant insists that there are one or more particular individual or individuals, who ought to put him in possession of something he wishes to obtain, or do something for him, or fulfil some promise, or repair some damage they have made or caused. Such a claim is primarily urged against particular persons, and not against the world at large. On this distinction between claims to things advanced against all men, and those advanced

primarily against particular men, is based the division of rights into real and personal, expressed by writers of the middle ages on the analogy of terms found in the writings of the Roman Jurists, by the phrase *jura in re*, and *jura ad rem*. A real right a *jus in re*, or to use the equivalent phrase preferred by some later commentators, *jus in rem*, is a right to have a thing to the exclusion of all other men. A personal right *jus ad rem*, or to use a much more correct expression, *jus in personam*, is a right in which there is a person who is the subject of the right, which gives its possessor a power to oblige another to give or procure, or do or not do something. It is true that, in a real right, the notion of persons is involved, for no one could claim a thing if there were no other persons against whom to claim it; and that in a personal right is involved the notion of a thing, for the object of the right is a thing which the possessor wishes to have given, procured, done or not done."

Besides actions *in rem* which related to property, there were certain actions called *actiones prejudicialis*. Of these it is said in the Institutes, Book 4, Tit. 6, sec. 13, that they seem to be actions *in rem*, such as 'those by which it is enquired whether a man was born free or had been made free; whether he was a slave, or whether he was the offspring of his reputed father.' These actions, no doubt, were the origin of the rule laid down as to judgments on actions in which questions relating to status were determined. Mr. Sandars in his note to that section says: "The object of a *prejudicialis actio* was to ascertain a fact, the establishing of which was a necessary preliminary to further judicial proceedings. Such actions differ from actions *in rem*, because in an *actio prejudicialis* no one is condemned, only the fact is ascertained; but they are said in the text to resemble actions *in rem*, because they were not brought on any obligation, and because in the *intentio*, which composed the whole formula in this case, no mention was made of any particular person. Questions of status, such as those of paternity, filiation, and the like, were most commonly the subjects of *actiones prejudicialis*, but were by no means the only ones. We hear of others.

"From what has been said, it will readily be seen that there are no suits in this country, with the exception of those in the High Court in the exercise of Admiralty and Vice-Admiralty Jurisdiction which answer to the actions *in rem* of the Civil Law, and none corresponding with the *actiones prejudicialis*. We have little to do with foreign judgments. Suits in the Exchequer for the condemnation of goods are not applicable to this country, and it is therefore unnecessary to refer to them. We have not as yet any suits here for divorce

*a vinculo matrimonii* so far as Christians are concerned, so that no question can arise as to the effect of judgments in such suit. Decrees of Courts of competent jurisdiction for the absolute dissolution of marriages are no doubt binding upon third parties. If a Court of competent jurisdiction decrees a divorce, or sets aside a marriage between Mahomedans or Hindus, it puts an end to the relationship of husband and wife, and is binding upon all persons that, from the date of the decree, the parties ceased to be husband and wife. This, in my opinion, is not upon the principle that every one is presumed to have had notice of the suit as Mr. Justice Holloway appears to think;\* for, if they had notice, they could not intervene or interfere in the suit, but upon the principle that, when a marriage is set aside by a Court of competent jurisdiction, it ceases to exist, not only so far as the parties are concerned, but as to all persons. A valid marriage causes the relationship of husband and wife, not only as between the parties to it, but also as respects all the world,—a valid dissolution of a marriage, whether it be by the act of the husband, as in the case of repudiation by a Mahomedan, or by the act of a Court competent to dissolve it, causes that relationship to cease as regards all the world. The record of a decree in a suit for divorce or of any other decree is evidence that such a decree was pronounced (see cases referred to in Smith's Leading Cases, Vol. II, page 439); and the effect of a decree in a suit for a divorce *a vinculo matrimonii* is to cause the relationship of husband and wife to cease. It is conclusive upon all persons that the parties have been divorced, and that the parties are no longer husband and wife; but it is not conclusive or even *prima facie* evidence against strangers that the cause for which the decree was pronounced, existed. For instance, if a decree between A and B were granted upon the ground of the adultery of B with C, it would be conclusive as to the divorce, but it would not be even *prima facie* evidence against C that he was guilty of adultery with B, unless he were a party to the suit. So, if a marriage between Mahomedans were set aside upon the ground of consanguinity or affinity, as for instance, in the case of a Mahomedan that the marriage was with the sister of another wife then living, the decree would be conclusive that the marriage had been set aside, and that the relationship of husband and wife had ceased, if it ever existed; but it would be no evidence as against third parties, for example, in a question of inheritance, that the two ladies were sisters. It is unnecessary to consider the principle upon which grants of probate and of letters of administration have been held to be conclusive upon

\* *Vide* Madras Regular Appeal No. 48 of 1864; 2 Stokes and O'Sullivan's Reports, 876.

third parties. It would throw no light upon the present question, and the Indian Succession Act, No. X of 1865, section 242, points out expressly the effect which they are to have over property, and the extent to which they are to be conclusive. It is quite clear that there are no judgments *in rem* in the Mufassil Courts, and that, as a general rule, decrees in those Courts are not admissible against strangers either as conclusive or even as *prima facie* evidence, to prove the truth of any matter directly or indirectly determined by the judgment or by the finding upon any issue raised in the suit whether relating to status, property, or any other matter."

Their Lordships of the Privy Council affirmed the same principle in *Jogendra Deb Rai Kat v. Fenendra Deb Rai Kat*, 11 B. L. R. 244.

**Probate Jurisdiction.**—Civil Courts have Probate Jurisdiction under the provisions of the following Acts :—

(a). Act X of 1865, Part XXXI. (The Indian Succession Act).

(b). Act XXI of 1870.

(c). Act V of 1881. (The Probate and Administration Act).

1. Letters of administration are conclusive as to the *representative title* of the grantee of the said letters, against all debtors of the deceased and against all persons holding property which belonged to him, and therefore the finding on the construction of a will by a Probate Court cannot be treated as *res judicata* or conclusive, and a subsequent suit for obtaining a construction of the will, will lie—*Arunmoyi Dasi v. Mohendra Nath Wadadar*, I. L. R. 20 Cal. 888.

2. The grant of probate is the decree of a Court which no other Court can set aside, except for fraud or want of jurisdiction—*Komollockun Dutt v. Nitrattan Mondla*, I. L. R. 4 Cal. 360. *Vide also In re Nilmony Singh*, I. L. R. 6 Cal. 429.

3. This section applies to probates granted prior to the passing of the Hindu Will's Act as well as to those granted after it—*Grish Ohundra Rai v. Broughton*, I. L. R. 14 Cal. 861.

4. The grant of probate to A is conclusive proof as against C, that A is B's executor—*Vide Allen v. Dundas*, 37 R. 125-130.

5. The judgment of a Probate Court granting or refusing probate is a judgment *in rem*, and therefore the judgment of any other Court in a proceeding *inter partes* cannot be pleaded in bar of an investigation in the Probate Court as to the *factum* of the will propounded in that Court—*Chinna Sami v. Hariharabadra*, I. L. R. 16 Mad. 380.

**Matrimonial Jurisdiction.**—The following acts confer matrimonial jurisdiction to the Civil Courts in India :—

- (a). Act IV of 1869. (The Indian Divorce Act relating to persons professing the Christian religion).
- (b). Act XV of 1865. (Parsi Marriage and Divorce Act).
- (c). Act XXI of 1866. (Native Converts Marriage Dissolution Act).
- (d). Act XV of 1872. (The Indian Christian Marriage Act).
- (e). Act III of 1872. (Relating to marriage between persons not professing the Christian, Jewish, Hindu, Mahomedan, Parsi, Buddhist, Sikh, or Jain religion).

**Marriage.**—It is indispensable to the validity of a marriage that the *lex loci actus* be satisfied so far as regards the forms or ceremonies, the consent of parents or guardians and the capacity of the parents to contract it, whether in respect of the prohibited degrees of affinity, or in respect of any other cause of incapacity, absolute or relative. The validity of a marriage being established, the conjugal rights which flow from it must be decided according to the *lex fori*.

**Foreign Judgment on Marriage.**—A foreign judgment on the validity of a marriage, would be conclusive, if the Court which passed it, had proper jurisdiction—*Vide Roach v. Garvan*, 1748, 1 Ves. Sen. 159.

**Divorce of a foreign Court.**—A divorce pronounced by a foreign Court is treated as valid in England when, and only when, the parties were domiciled within the jurisdiction of that Court, at the time of the suit in it.—Westlake's Int. Law, 3rd Ed., 83.

**Admiralty Jurisdiction.**—*Vide*—

- (a). Letters Patent of 1865, sec. 32 (Calcutta High Court).
- (b). 12 and 13 Vic. Cap. 96 ; 23 and 24 Vic. Cap. 88 (Muffasil Courts).

**Article 42 of Stephen's Digest.**—Statements contained in judgments as to the facts upon which the judgments are based, are deemed

to be irrelevant as between strangers, or as between a party or privy, and a stranger, except in the case of judgments of Courts of Admiralty condemning ship as a prize. In such cases the judgment is conclusive proof as against all persons of the fact on which the condemnation proceeded, where such fact is plainly stated upon the face of the sentence.

**Foreign Court of Admiralty.**—The sentence of a foreign Court of Admiralty, condemning a ship as enemy's property, is conclusive evidence in favour of the under-writers against the warrant of neutrality—*Geyer v. Aguilar*, 1798, 7 T. R. 681. *Westlake*, Int. Law, 357.

**Insolvency Jurisdiction.**—*Vide*—

(a). 11 and 12 Vic. Cap. 21. (High Courts).

(b). Letters Patent of 1865, sec. 18. (Calcutta High Court).

(c). Code of Civil Procedure Act, XIV of 1882, Chap. XX (Muffasil Courts).

**Judgment in rem on a Moveable.**—The distinctive mark of a judgment *in rem* on a moveable is that it disposes of the thing itself, and not merely of the interests which any parties have in it. It is immaterial whether the judgment does this (1) by vesting the property at once in a party as against all the world, as a condemnation in a revenue cause, vests the property in the crown, or the sentence of a Court of Admiralty in a matter of prize, vests the property in the captors; or (2) by decreeing or confirming the sale of the moveable in satisfaction of a money demand which it adjudges to have been a lien on the thing itself, and not merely on the interests of any parties in it; or (3) by decreeing or confirming the sale of the moveable by way of administration, in matters of bankruptcy or succession on death. The leading authority is *Castrique v. Imrie*, 1870, L. R. 4 E. and L. A. 414. Blackburn J., in delivering the opinion of the Judges, said: "We may observe that the words as to an action being *in rem* or *in personam*, and the common statement that the one is binding on third persons and the other not, are apt to be used by English lawyers without attaching any very definite meaning to those phrases. We apprehend the true principle to be that indicated in the last few words quoted from Story. We think the enquiry is *first*, whether the subject-matter was so situated as to be within the control of the State under the authority of which the Court sits; and *secondly*, whether the sovereign authority of that State has conferred on the Court jurisdiction to decide as to the disposition of the thing, and the Court has



acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against all the world.\*

42. Judgments, orders or decrees other than those mentioned in section forty-one, are relevant if they relate to matters of a public nature relevant to the enquiry ; but such judgments, orders or decrees are not conclusive proof of that which they state.

Relevancy and effect of judgments, orders or decrees, other than those mentioned in sec. 41.

#### Illustration.

A sues B for trespass on his land. B alleges the existence of a public right of way over the land, which A denies. The existence of a decree in favor of the defendant, in a suit by A against C for a trespass on the same land, in which C alleged the existence of the same right of way, is relevant, but it is not conclusive proof that the right of way exists.

**Scope of the Section.**—This section admits all judgments, not as *res judicata*, but as evidence, although they may not be between the same parties, provided they relate to matters of a public nature relevant to the enquiry.\*

Mr. Norton says : "There is, however, an exception to be noticed, to the general rule that judgments *inter partes* are only receivable against the parties to them and not against strangers. This occurs where the judgment is upon a subject of a public nature ; such as customs, prescriptions, tolls, boundaries between parishes, counties, or manors, rights of fishery, liability to repair roads, sea-walls, or the like. A judgment of this nature is even admissible against strangers though it is not conclusive as against them."—Norton's Evi., sec. 479.

#### Instances of Judgments admissible under this Section—

(a). In a suit for pre-emption based on custom, evidence of decrees passed in favour of such a custom, in suits in which it was alleged and denied, is admissible evidence to prove its existence. The most satisfactory evidence of an enforcement of a custom is a final decree based on the custom—*Gurdayal Mal v. Jhandu Mal*, I. L. R. 10 All. 585.

(b). The decisions as to rates of rent in previous suits are admissible as evidence of local usage, though the tenants in the cases

\* *Vide Guffu Lal v. Patch Lal*, I. L. R. 6 Cal. 170.

before them were not parties to them—*Easwara Dass v. Gungavana Chari*, I. L. R. 13 Mad. 361.

(c). Evidence of criminal proceedings and a *rasinama* come to, in consequence, between other parties, was admitted in *Rameshur Prosad Narain Singh v. Koonj Behari Patack*, L. R. 6 I. A. 33, in support of a presumption to a legal right to enjoy the water in dispute. Their Lordships said: "It was objected that this *rasinama* does not bind the proprietors of Mahooet, but although it was apparently made between tenants, it seems to have been subsequently acted on and may properly be used to explain the character of the enjoyment of the water."

(d). Decrees in chancery between other parties are admitted in land cases to explain the character in which the possessor enjoyed the land—*Davies v. Lowndes*, 1 Bing. (N. S.) 606.

(e). In a suit brought by the trustees of a temple to recover from the owners of certain lands in certain villages, money claimed under an alleged right as due to the temple. *Held*, that judgments in other suits against other parties in which claims under the same right had been decreed in favor of the trustees of the temple, were relevant under this section, as relating to matters of a public nature—*Ramasammi v. Apparu*, I. L. R. 12 Mad. 9.

(f). The amount of rent was in question in the suit. The plaintiff contended that the amount of the rent was to be computed after the measurement of the land by a cubit of 18 inches, while the defendant maintained that the cubit prevalent in the pergunnah was one of 21 odd inches. In this suit the plaintiff tendered in evidence twenty-one decrees which he had obtained against other tenants of the same pergunnah in which 18 inches had been taken to be the customary cubit, and it was held that these decrees were admissible in evidence as furnishing evidence of particular instances in which a custom was claimed—*Jianatulla Sirdar v. Ramani Kant Rai*, I. L. R. 15 Cal. 233.

(g). In a suit for possession of land the defendant, in order to show the character of his possession, offered in evidence a judgment obtained by him in a suit to which the plaintiff or his predecessors in title were not parties. *Held*, that the judgment was admissible in evidence—*Peary Mohun Mukerji v. Drobomoyi Dabi*, I. L. R. 11 Cal. 745. This case followed *Davies v. Lowndes*, 1 Bing. N. C. 606, and *Rameshur Prosad Narain Sing v. Kunja Behari Pattuck*, L. R. 6 I. A. 33.

43. Judgments, orders or decrees, other than those mentioned in sections forty, forty-one and forty-two, are irrelevant, unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provision of this Act.

Judgments, &c., other than those mentioned in secs. 40—42, when relevant.

#### *Illustrations.*

(a). A and B separately sue C for a libel which reflects upon each of them. C in each case says, that the matter alleged to be libellous is true, and the circumstances are such that it is probably true in each case, or in neither. A obtains a decree against C for damages on the ground that C failed to make out his justification. The fact is irrelevant as between B and C.

(b). A prosecutes B for adultery with C, A's wife. B denies that C is A's wife, but the Court convicts B of adultery. Afterwards, C is prosecuted for bigamy in marrying B during A's lifetime. C says that she never was A's wife. The judgment against B is irrelevant as against C.

(c). A prosecutes B for stealing a cow from him. B is convicted. A, afterwards, sues C for the cow, which B had sold to him before his conviction. As between A and C, the judgment against B is irrelevant.

(d). A has obtained a decree for the possession of land against B. C, B's son, murders A in consequence. The existence of the judgment is relevant, as showing motive for a crime,

(e).\* A is charged with theft and with having been previously convicted of theft. The previous conviction is relevant as a fact in issue.

(f).\* A is tried for the murder of B. The fact that B prosecuted A for libel and that A was convicted and sentenced is relevant under sec. 8 as showing the motive for the fact in issue.

**Scope of the Section.**—The cases contemplated by this section are those where a judgment is used not as a *res judicata*, or as evidence

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\* These illustrations have been added to this section by Act III of 1891, sec. 5.

more or less binding upon an opponent by reason of the adjudication which it contains (because judgments of that kind have already been dealt with under one or other of the immediately preceding sections), but the cases are such as the section itself illustrates, *vis.*, when the fact of any particular judgment having been given is a matter to be proved in the case, or when such judgment is a fact relevant within some one of the classes of relevant facts given in the Act. As for instance, if A sued B for slander, in saying that he had been convicted of forgery, and B justified, upon the ground that the alleged slander was true, the conviction of A for forgery would be a fact to be proved by B like any other fact in the case and quite irrespective of whether A had been actually guilty of the forgery or not.\* The section is an exception to the general rule that all judgments, which do not come under the two preceding sections, are irrelevant. A judgment may not be admissible for the purpose of proving the truth of what it asserts, but it may have an evidentiary value for some other purpose. It may be relevant for proving the fact, if such a fact be in issue, that such a judgment was made as supplying motive; for the purpose of proving a previous conviction against a witness and discrediting him as explaining the relations of the parties; sometimes as admissions of parties by their conduct and sometimes as relevant facts under sec. 13 of the Code. In fact the section declares that judgments, orders and decrees other than those mentioned in secs. 40, 41 and 42 are of themselves irrelevant, that is, in the sense that they can have any such effect or operation as mentioned in those recited sections *qua* judgments, orders and decrees, but they are relevant only when their *existence* is a fact in issue, or relevant under some other provision of the Act, *vis.*, sec. 13 of the Code.

Illustrations (d), (e) and (f) are instances of judgments being relevant otherwise than under the three previous sections.

**Instances of Admissible Judgments.**—(a). In a suit to establish an itnamee right to certain lands, plaintiff produced certain transcript decisions of the Civil Court in suits in which a former holder of the tenure of the person who was said to have created the right, was a party; but the Lower Appellate Court rejected them as evidence on the ground that the defendant was not a party to the suits. *Held*, that the proceedings in such suits came within the meaning of any 'transaction' in the Evidence Act of 1872, sec. 13, and were admissible as evidence in the case under sec. 43, not as conclusive, but as of such weight as the Court might think they ought to have—*Neamat Ali v. Gooroo Dass*, 22 W. R. 367.

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\* *Vide Gujra Lal v. Patah Lal*, I. L. R. 6 Cal. 171.

(b). *Omer Dutt Jha v. Colonel James Burn*, 24 W. R. 479.

(c). *Vide Piari Mohan Mukerji v. Drobomoyi Dabi*, I. L. R. 11 Cal. 745.

(d). *Venkatareddi v. Venkatasami*, I. L. R. 15 Mad. 12.

(e). The decisions, as to rates of rent, in previous suits, are admissible as evidence of local usage, though the tenants in the case before them were not parties to them—*Kanwara Dass v. Pungavanachari*, I. L. R. 13 Mad. 361.

(f). Judgments and decrees recognizing rights between parties to a suit or between persons whom they represent, although they are not conclusive under the Indian Evidence Act, as they were before the Act came into operation, are yet admissible in evidence under sec. 13, even if the parties in the former suit be entire strangers—*Naranji Bhikhabai v. Dipa Umed*, I. L. R. 3 Bom. 3.

(g). A judgment may be employed for the purpose of showing that documents which bear such distant date that their attestation or proof in the usual form is impossible, has been used publicly on a former occasion, and that on that occasion they have been found to be authentic document—*Nagur Singh v. Mushnund Khan Sirdar*, 11 W. R. 309.

(h). In the case of joint Hindu family subject to the Mithila and Mitakshara laws, decrees against the father have been often admitted as evidence of necessity of alienation by him not only of his own share, but of his son's shares as well, and the sons have been held to be bound by such decrees though they were not made parties to them—*Vide* (1) *Muddun Thakoor v. Kantoo Lal*, 22 W. R. (P. C.) 56; (2) *Besserwar Lal v. Luchmessur Singh*, 5 C. L. R. 477; (3) *Darbhanga v. Koomar*, 14 M. L. A. 605; (4) *Jugal Kishore v. Jotindra Mohan*, I. L. R. 10 Cal. 985; (5) *Jaiman Bapaji Shet v. Jama Kandia*, I. L. R. 11 Bom. 361; (6) *Lala Parbhu Lal v. Mylne*, I. L. R. 14 Cal. 401. But when it appeared upon the facts of any particular case that the creditor, by the frame of his suit or of his proceedings in execution, had elected to enforce his rights against the father alone, or against his share of the family property, he could not afterwards contend that the whole family property had passed to the purchaser at the Court sale, and the decree would not be evidence against the son to prove such an allegation—*Vide* (1) *Deendyal v. Jugdeep Narain*, I. L. R. 3 Cal. (P. C.) 198; (2) *Pursid v. Hanooman*, I. L. R. 5 Cal. 845; (3) *Bika v. Luchman*, I. L. R. 2 All. 800; (4) *Chundra v. Gunga*, I. L. R. 2 All. 899; (5) *Nanhak v. Jaimunyal*, I. L. R. 3 All. 294; (6) *Basamal v. Maharaj Singh*, I. L. R. 8 All. 205; (7) *Balbir Singh v. Ajudhia Prasad*, I. L. R.

9 All. 142; (8) *Bhikaji Ramchundra v. Yashanvatrow*, I. L. R. 8 Bom. 489; (9) *Shabbayen v. Rупpa Nagami*, I. L. R. 5 Mad. 165; (10) *Uma Maheswara v. Singaperumal*, I. L. R. 8 Mad. 376; (11) *Ithachen v. Velappen*, I. L. R. 8 Mad. 484.

**Instances of Inadmissible Judgments.**—(a). In a civil suit upon a kistibundi bond, the Munsiff before whom the case was tried, was of opinion that the signatures on the bond were forgeries and he dismissed the suit, at the same time directing a prosecution for forgery, and for using the document as genuine, knowing it to be forged. At the trial by the Criminal Court, the judgment of the Munsiff was admitted in evidence, and the substance of his judgment referred to by the Judge in his charge to the jury. *Held*, that the judgment of the Munsiff was inadmissible in evidence—*Gagan Chunder Ghose v. The Empress*, 7 C. L. R. 74.

(b). In *Reg. v. Parbhudas Ambaram*, 11 Bom. H. C. Rep. 90, West J. held that where a person charges another with having forged a promissory note, and denies having ever executed any promissory note at all, the evidence that a note, similar to the one alleged to be forged, was, in fact, executed by that person, is not admissible nor even would a judgment, founded upon such evidence, be so.

(c). A proceeding of a Criminal Court is not admissible as evidence in a civil suit. A Civil Court is bound to find the facts for itself—*Keramutoollah Chowdhry v. Gholam Hossein*, 9 W. R. 77. *Vide also Ali Buksh Doctor v. Sheikh Sumeerudeen*, 12 W. R. 477; *Nittyannand Sarma v. Kashinath Nyalunkar*, 6 W. R. 26; *Simbhoo Chundra Chowdhary v. Madhoo Kyburt*, 10 W. R. 56.

(d). A decree obtained against a registered tenant is not evidence for ever in future proceedings against an unregistered transferee—*Ram Narain Rai v. Ramkumar Chundra Poddar*, I. L. R. 11 Cal. 562.

#### 44. Any party to a suit or other proceeding

Fraud or collusion in obtaining judgment, or incompetency of Court, may be proved.

may show that any judgment, order or decree which is relevant under section forty, forty-one or forty-two, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

**Scope of the Section.**—In order to avoid any judgment, order or decree, the party against whom it is offered may prove : 1st—That the

Court rendering such judgment, order or decree had no jurisdiction of the subject-matter or of the parties; 2<sup>nd</sup>—That it was obtained by fraud or collusion. This section clearly entitles a stranger or an innocent party to a former action to show that the judgment was obtained by some other person's fraud or collusion. It seems questionable if the section was intended to allow a party to set up his own fraud or collusion in procuring a judgment, in order to defeat it. The section does not seem to provide an exception to the rule of equity that no man can take advantage of his own wrong. But unfortunately its language appears to be wide enough to allow a party to the suit, in which the judgment, order or decree was obtained, to aver that it was obtained by his own fraud or collusion.\* In art. 46 of his Digest of the Law of Evidence, Sir J. F. J. Stephen lays down: "Whenever any judgment is offered in evidence under any of the articles hereinbefore contained, the party against whom it is offered may prove that the Court which gave it had no jurisdiction, or that it has been reversed, or, if he is a stranger to it, that it was obtained by any fraud or collusion, to which neither he nor any person to whom he is privy was a party." This view has been taken by the Bombay High Court in the case of *Ahmedbhoy Hubibhoy v. Cassumbhoy*, (I. L. R. 6 Bom. 703). The Madras High Court also has taken the same view. In the case of *Venkatramanna v. Viramma*, (I. L. R., 10 Mad. 17), Parker J. observes: "Although when a contract or deed is made for an illegal or immoral purpose, a defendant against whom it is sought to be enforced may, not for his own sake but on grounds of general policy (per Lord Mansfield in *Holman v. Johnson*), (Cowper, 343) and *Luckmidas v. Mulji Canji*, (I. L. R. 5 Bom. 295), show the turpitude of both himself and the plaintiff, it is otherwise when a decree has been obtained by the fraud and collusion of both the parties. In such a case it is binding upon both—*Ahmedbhoy Hubibhoy v. Cassumbhoy*, (I. L. R. 6 Bom. 703) and *Prudham v. Phillips*, (2 Ambler, 763)."

**Fraud.**—For definition of fraud, *vide* sec. 17 of the Contract Act. Story in his Equity Jurisprudence, sec. 187, gives the following definition of fraud:—"Fraud, indeed, in the sense of a Court of Equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another." He distinguishes two kinds of fraud, *viz.*, Actual or Positive Fraud and Constructive Fraud. Actual fraud he thus defines: "Where the party intentionally or by design misrepresents a material fact, or produces a

\* *Vide Ahmedbhoy Hubibhoy v. Vallubhoy Cassumbhoy*, I. L. R. 6 Bom. 703.

false impression; in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage of him; in every such case there is a positive fraud in the truest sense of the term. There is an evil act with an evil intent; *dolum malum ad circumveniendum*. And the misrepresentation may be as well by deeds or acts, as by words; by artifices to mislead, as well as by positive assertions.\* Constructive Frauds are thus defined: "By constructive frauds are meant such acts or contracts, as, although not originating in any actual evil design, or contrivance to perpetrate a positive fraud or injury upon other persons, are yet, by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interests, deemed equally reprehensible with positive fraud, and, therefore, are prohibited by law, as within the same reason and mischief, as acts and contracts, done *male animo*."†

**Collusion.**—Collusion has been defined to be a deceitful agreement or compact between two or more persons to do some act in order to prejudice a third person or for some improper purpose. Collusion in judicial proceedings is a secret agreement between two persons that the one should institute a suit against the other, in order to obtain the decision of a judicial tribunal for some sinister purpose. It may be of two kinds: (1) when the facts put forward as the foundation of the judgment of the Court do not exist; (2) when they exist, but have been corruptly preconcerted for the express purpose of obtaining the judgment.—Field's Evi., 5th Ed., 342.

**Legal Effect of Fraud or Collusion.**—(a). Lord Chief Justice de Grey, in delivering the answer of the Judges to the House of Lords in the *Duchess of Kingston's case*, speaking of a certain sentence of a Spiritual Court, says: "If it was a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the Court, and not to be impeached from within, yet, like all other acts of the highest judicial authority, it is impeachable from without. Although it is not permitted to show that the Court was *mistaken*, it may be shown that they were *misled*. Fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of Courts of Justice. In such cases, as has been well expressed, the whole proceeding was *fabula, non iudicium*. And this principle applies to every species of judgment; to judgments of Courts of exclusive jurisdiction; to judgments *in rem*; to judgments of foreign tribunals, and even to judgments of the House of Lords."—Best, 8th Ed., 547.

\* Vide sec. 192, Story's Equity Jurisprudence.  
† Vide sec. 258, Story's Equity Jurisprudence.



(b). Lord Coke says : " Fraud avoids all judicial acts, ecclesiastical and temporal."

(c). In *Flower v. Lloyd*, (6 Ch. Div. 297), James L. J. said : " In the case of a decree being obtained by fraud, there always was power and there still is power in the Courts of law in this country to give adequate relief."

(d). In *Meddow Croft v. Hugunium*, 4 Moore P. C. 386, Lord Brougham said : " A collusive suit is not a real judgment but something obtained by fraud from the Court which is not binding."

(e). A sentence may be refused the respect which would otherwise be due to it, if it can be shown, as it may be shown, that the sentence was obtained by fraud and collusion—*Perry v. Meddow Croft*, 10 Beav. 122.

(f). In *The Queen v. Baddlers Company*, 10 H. L. C. 431, Willes J. said : " A judgment or decree obtained by fraud upon a Court binds not such Court nor any other ; and its nullity upon this ground, though it has not been set aside or reversed, may be alleged in a collateral proceeding."

(g). In a case of *The Earl of Banden v. Becher*, 3 Cl. and F. 497, Lord Brougham, after saying that it was undeniably true that the Court of Chancery had no right to review a decree of the Court of Exchequer, observed : " but it is equally true, that if the decree has been obtained by fraud, it shall avail nothing for or against the parties affected by it, to the prosecution of a claim or to the defence of a right." And a little further he added : " It is not an irregularity, it is not an error which is here complained of ; but it is that the whole proceeding is collusive and fraudulent ; that it cannot, therefore, be treated as a judicial proceeding, but may be passed by as availing nothing to the party who sets it up."

**Court not Competent.**—The words " not competent " refer to a Court acting without jurisdiction—*Kelilamma v. Kelappan*, I. L. R. 12 Mad. 228.

**Mode of proving Fraud to set aside judgments, &c.**—(a). The fraud, to justify a Court of Equity in setting aside the judgments of Courts, either of law or equity, domestic or foreign, must be that which occurs in the very connection or procuring of the judgment itself, and something not known to the opposite party at the time, and for not knowing which he is not chargeable with neglect or inattention."—Story's Equity, sec. 252 (a).

(b). Fraud must not be assumed without good and probable grounds—*Kishen Dhun Surmah v. Ramdhun Chatterji*, 6 W. R. 235.

(c). It is a well-known rule that a charge of fraud must be substantially proved as laid, and that when one kind of fraud is charged, another kind of fraud cannot, upon failure of proof, be substituted for it—*Abdul Hossein Zenail Abadi v. Charles Agnew Turner*, I. L. R. 11 Bom. (P. C.) 620. See also *Mir Asimudin Khan v. Ziaunnissa*, I. L. R. 6 Bom. 309.

(d). Where a party alleges the fraud or collusion of the opposite party as a ground of relief, general allegations of it will not be sufficient, but the instances upon which such allegations are founded must be stated; as it is unreasonable to require the opposite party to meet a general charge of that nature without giving him a hint of the facts from which it is to be inferred—*Joomna Pershad Sookul v. Joyram Lal Mahto*, 2 C. L. R. 26. See also *Siva Pershad Maity v. Nund Lal Kar Mahapatra*, I. L. R. 18 Cal. 139.

**Instances of Fraud vitiating judgments, &c.—(a).** A mortgaged certain property to B, who instituted a suit on his mortgage and obtained a decree therein. Subsequent to such decree, A sold the property to a third party C. B, having attempted to execute his decree against the property in the hands of C, the latter instituted a suit against A and B, for the purpose of having it declared that the property was not liable to satisfy the decree because the mortgage transaction was a fraudulent one and the decree had been obtained by fraud and collusion. In such suit B contended that C having purchased subsequent to the decree was absolutely bound by it. *Held*, that having regard to the terms of sec. 44, it was perfectly open to C to prove that the decree had been obtained by fraud and collusion—*Nilmony Mukhopadhyaya v. Aiminissa Bibee*, I. L. R. 12 Cal. 156.

**Persons other than parties to a suit in which a decree or judgment has been obtained.**—Such persons may be divided into three classes with reference to their position as affected by such judgment: I—Persons who claim under the parties to the former suit, or, in the language of English Law, *privies* to those parties. Privies are of three kinds: 1st, Privies in blood; 2nd, Privies in estate; and 3rd, Privies in law: II—Persons who, though not claiming under the parties to the former suit, were represented by them therein. Such are persons interested in the estate of a testator or intestate in relation to the executor or administrator; shareholders in a company and members of a joint and undivided family in such cases as those referred to in *Jogendra v. Funindro*, (14 M. L. A. 376): III—Strangers, neither privies to, nor represented by, the parties to the former suit.\*

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\* *Vide Apauddhoy Subbhoj v. Fullachoy Chennabhoj*, I. L. R. 6 Bom. 792.

**Effect of a previous judgment on the three classes mentioned above.—1st.**—If the judgment be an honest one obtained in a suit conducted with good faith on the part of both plaintiff and defendant, it is clearly binding on class I and class II. Class III (strangers to the former suit) will be, in no way, affected by the judgment if it be *inter partes*; but if it be one *in rem*, passed by a competent Court, they will be bound by and can not controvert it.

**2nd.**—If the judgment has been passed in a suit really contested by the parties thereto, but obtained by the fraud of one of them as against the other, it is binding on class I and class II, and on class III, if it be a judgment *in rem*, so long as it remains in force, but it may be impeached for fraud and set aside if the fraud be proved.

**3rd.**—If the judgment has been obtained by the fraud and collusion of both the parties to the former suit, it ought to be binding on the parties to it. In the case of *Preedham v. Phillips*, 2 Ambler 763, it was remarked that: "if both parties colluded, it was never known that one of them could vacate it." It ought also to be binding on the privies of the parties, except probably, where the collusive fraud has been on a provision of law enacted for the benefit of such privies. But any member of class II and (where a judgment *in rem* is in question) of class III, may, in any subsequent proceeding, whether as plaintiff or defendant, treat it as a mere nullity, provided of course that he clearly establishes the fact of the fraud and collusion.\*

The rule above laid down as regards parties and their privies, does not seem to be sanctioned by the present section. Its language is wide enough to allow a party to the suit in which the judgment was obtained to aver that it was obtained by the fraud of his antagonists, though the judgment stands unreversed. It is also wide enough to allow a party to set up his own fraud or collusion in procuring the former judgment in order to defeat it. It seems to us that a proviso to this section should be made on the lines indicated in art. 48, Stephen's Dig., quoted above.

### *Opinions of third persons, when relevant.*

45. When the Court has to form an opinion  
 Opinions of upon a point of foreign law, or of  
 experts. science or art, or as to indentity of  
 handwriting, the opinions upon that point of  
 persons specially skilled in such foreign law, science

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\* *Vide* I. L. R. 6 Bom. 768.

or art, or in questions as to identity of handwriting, are relevant facts. Such persons are called experts.

### *Illustrations.*

(a). The question is, whether the death of A was caused by poison. The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died, are relevant.

(b). The question is, whether A, at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law. The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.

(c). The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A. The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant.

**Scope of the Section.**—This section makes admissible the opinions of experts upon three matters : (1) points of foreign law, (2) points of science or art, and (3) points as to identity of handwriting. Mr. Best says : “On question of science, skill, trade, and the like, persons conversant with the subject-matter called by foreign jurists ‘experts,’ an expression now naturalised among us, are permitted to give their opinions in evidence.” Mr. Smith in commenting upon *Carter v. Boehm* (1 Smith’s Leading cases) says that “the opinion of witnesses possessing peculiar skill is admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance ; in other words, when it so far partakes of the nature of a science as to require a course of previous habit or study, in order to the attainment of a knowledge of it.”

**Foreign Law.**—All that can be required of a tribunal adjudicating on a question of foreign law, is to receive and consider all the evidence as to it which is available, and *bond fide* to determine

on that, as well as it can, what the foreign law is. For such a purpose, besides the opinion of experts, statements of law in Law Books and Law Reports are admissible (*vide* sec. 38), and the Courts may presume such books and reports to be genuine (sec. 84) and may refer to them for information (sec. 56). Experts may be asked to testify to the nature or effect of a foreign unwritten law, and to the practice, law or usages of another State.

**Science or Art.**—The words science or art include all subjects on which a course of special study or experience is necessary to the formation of an opinion, and amongst others the examination of handwriting—Steph. Dig., art. 49.

**Experts.**—It is the duty of the Judge to decide, whether the skill of any person in the matter on which evidence of his opinion is offered is sufficient to entitle him to be considered as an expert. The Judge should decide this question first, and the question whether a matter really involves the points mentioned in this section and then allow opinion evidence to go in. The test to be applied in deciding whether a matter really involves the points for consideration is whether the point to be decided involves special acquaintance with a particular subject, or whether it is a mere question of legal or moral obligation about which one person is as good a Judge as another. A professional man, in a matter not studied by him as a specialty, is regarded as an ordinary observer.

**Specially Skilled Person.**—Specially skilled person means, says Cunningham J.: "Any person who, from his circumstances and employment, possesses exceptional means of knowledge, has given the subject particular consideration and is more than ordinarily conversant with its details. A clerk, for instance, whose business, amongst other things, it was to scrutinize the handwriting of different people and to detect points of resemblance or variety, might give an opinion on a question of handwriting, although his 'special skill' was something short of that of a first-rate London expert. If he has any special skill, his opinion is relevant: the degree in which he possesses such skill, and the consequent value of his evidence is, of course, matter for comment, but the admissibility of his evidence does not depend upon it."

**Instances of Opinion Evidence.**—"The opinions of medical men are constantly admitted as to the cause of disease or of death, or the consequence of wounds, or with respect to the sane or insane state of a person's mind as collected from a number of circumstances, and on other subjects of professional skill. Seal engravers may be called to give their opinion upon an impression, whether it was made from an original seal or from an impression; the opinion of an artist is

evidence in an inquiry as to the genuineness of a picture ; a ship-builder, after having heard the evidence of persons who have examined a ship, may give his opinion as to whether she was seaworthy ; and where the question was whether a bank which had been erected to prevent the overflowing of the sea, had caused the choking up of a harbour, the opinions of scientific engineers as to the effect of such an embankment upon the harbour were held admissible evidence. To these it may be added, that the opinions of antiquaries have been received relative to the date of ancient handwriting ; and that the opinions of experts in handwriting have been received to prove that a particular letter was or was not written by a particular person. Where, on an indictment for uttering a forged instrument, the question was whether a paper had originally contained certain pencil-marks which were alleged to have been rubbed out and writing substituted in their stead, the opinion of an engraver who was in the habit of looking minute lines on paper, and who had examined the document with a mirror as to such marks having existed, was held to be admissible, but with the reservation that the weight of the evidence would depend on the extent to which it might be confirmed. It is on this principle that the evidence of professional or official persons is receivable as proof of their own foreign laws. From the very nature of the subject experts can only speak to their judgment or belief."—Best, 8th Ed., 467-468.

(a). An accountant, who was acquainted with the business of life insurance, has been allowed to give evidence as to the average and probable duration of lives and the values of annuities—*Rowley v. L. and N. W. Railway*, (L. R. 8 Ex. 221).

(b). Experienced ship-wrights have been frequently called to give evidence as to whether a ship in the state in which a particular ship was sworn to be on a certain day of the voyage could have been seaworthy when the policy was effected—*Thornton v. Royal Exchange Association Company*, (Peake 37).

(c). A witness possessing nautical knowledge is frequently treated as an expert.

(d). The evidence of commercial men is admissible to explain particular expressions in a letter on a commercial subject.

(e). A seal engraver may be asked to say whether an impression was made from an original seal or from another impression.

(f). The opinion of the clerk of a Post Office may be admitted to prove the genuineness of a post-mark.

(g). The opinion of an artist is admissible to prove the genuineness of a picture.

(k). An attorney may testify to the value of professional services, or to a point of practice.

(l). The evidence of a physician or surgeon is receivable with regard to matters within the line of his profession.

(j). A linguist may be asked to testify to the force of language as varied by local, technical, or peculiar usage.

**The Method of taking Expert Evidence.**—(a). Expert evidence should be based not upon a mere theory with a view to fit in the facts of a particular case to it, but that the theory should be constructed from the proved facts. Given certain facts, the expert opinion should be given upon them, and upon them only. No expert witness ought to be asked his opinion on the supposition only that certain facts existed.

(b). The evidence of experts is given on the assumption that certain facts occurred, but that it does not in common cases show whether or not the facts on which the expert gives his opinion did really occur. .... Strictly speaking, an expert ought not to be asked "Do you think that the deceased man died of poison?" He ought to be asked to what cause he would attribute the death of the deceased man, assuming the symptoms attending his death to have been correctly described' or whether any cause except poison would account for such and such specified symptoms? Stephen's Evidence Act.

(c). The general rule as to expert evidence is that the question must be put to the witness hypothetically,—put in this way—"Assuming such and such facts to be true, what is your opinion on the matter?" Assuming such and such an injury, an injury of such and such a kind to have been inflicted, what is your opinion as to the nature of the weapon by which it was possibly or probably inflicted?" The facts thus hypothetically stated to the witness would of course be the facts which the evidence of other witnesses in the case attempted to prove, and as to which it was for the jury to find whether they had been proved or not—*Roghuni Singh*, 11 C. L. R. 569.

(d). A medical man, who had not seen a corpse which was subjected to a *post mortem* examination, was called to corroborate the doctor who had made the examination; *held*, that he ought to be asked his opinion as to the cause of death on the hypothesis that the signs observed at the *post mortem* were really present and observed—*Queen-Empress v. Meher Ali Mullick*, I. L. R. 15 Cal. 589.

(e). Passages from well-known scientific works may be read during trial, as evidence of opinions of experts—*Hurry Charn Chuckerbutty v. Empress*, I. L. R. 10 Cal. 143.

**Value of Expert Evidence.**—(a). “The substance of the rules as to experts is that they are only witnesses, not Judges ; that their evidence, however important, is intended to be used only as materials upon which others are to form their decision ; and that the fact which they have to prove is the fact that they entertain certain opinions on certain grounds, and not the fact that grounds for their opinion do really exist.”

(b). Mr. Best says : “It would not be easy to overrate the value of the evidence given in many difficult and delicate inquiries not only by medical men and physiologists, but by learned and experienced persons in various branches of science, art and trade. But as it is impossible to measure *a priori* the integrity of any witness, and equally so to determine the amount of skill which a person following a particular science, art or trade may possess, the tribunal is under the necessity of listening to all such persons when they present themselves as witnesses. Now, after making every allowance for the natural bias which witnesses usually feel in favour of causes in which they are engaged, and giving a wide latitude for *bond fide* opinions, however unfounded or fantastical, which persons may form on subjects necessarily depending much on conjecture,—there can be no doubt that testimony is daily received in our Courts as scientific evidence to which it is almost profanation to apply the term ; as being revolting to common sense, and inconsistent with the commonest honesty on the part of those by whom it is given. In truth, witnesses of this description are apt to presume largely on the ignorance of their hearers with respect to the subject of examination, and little dread prosecution for perjury, an offence of which it is extremely difficult, indeed, almost impossible, to convict a person who only swears to his belief, particularly when that belief relates to scientific matters. On the other hand, however, mistakes have occasionally arisen from not attaching sufficient weight to scientific testimony. This arises chiefly where the knowledge of the tribunal and society in general are very much in arrear of the scientific knowledge of the witness.”—Evidence, 8th Ed., 469-470.

(c). Bovill C. J., in making remarks on medical evidence said : “The great misfortune or defect in medical testimony hitherto has been that medical men, like many other professional men, have been too much in the habit of making themselves partisans in endeavouring to support the particular views of the parties on whose behalf they have been called, and this has led to conflicts of opinion which have sometimes appeared not very creditable to the profession.”

(d). Lord Hatherley expressed his views in the following manner :—  
“A witness to facts knows that it would be base beyond measure



to band his evidence so as to suit the case of him on whose behalf he is called, and that his only duty is to state plainly without colour or fencing what he knows as a *fact*. But the witness who gives an *opinion* is selected by the litigant, often communicating with many of the same profession as the witness, and when so selected, he is expected to express a particular opinion.....The scientific witness called into Court by the plaintiff is generally expected to support his case in cross-examination, when many views may be suggested that may really modify the witness's judgment; but even after facts have been proved that ought to modify it, the witness frequently holds to his original opinion."

(e). In the case of '*McNaghten*,' 10 Cl. and Fin. 200, the following question was proposed to the English Judges by the House of Lords:—"Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind, at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law or whether he was labouring under any and what delusion at the time?" The majority of the judges returned the following answer. "We think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right."

(f). Cockburn C. J., in commenting upon such evidence remarked:—"That it was in the nature of things, that those who gave scientific evidence should lean slightly to the side upon which they were giving their testimony, not from any dishonest intention, but from a perfectly natural and human failing, as in such cases a man was apt to look with a keener eye on those things favourable to his own side, than on those which were unfavourable."

(g). In the case of *The Queen v. Ahmed Ally*, 11 W. R. 25, their Lordships held, that it was not the proper way to try a case to rely on mere theories of medical men or skilled witnesses of any sort against facts positively proved. Norman J. remarked: "The evidence

of a medical man or other skilled witness, however eminent, as to what he thinks, may or may not have taken place under a particular combination of circumstances, however confidently he may speak, is ordinarily a mere matter of opinion. Human judgment is fallible. Human knowledge is limited and imperfect. New and previously unobserved phenomena, which, till they have been recorded, are supposed to be impossible, are constantly being noticed. It would have been easy to convict the first man who crossed the Atlantic in a steam-ship of perjury had he told his tale in Court, if the opinions of skilled witnesses, who, at the commencement of this century, believed such a feat impossible, could have been accepted as sufficient proof of the falsehood of the statement."

46. Facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

Facts bearing upon opinions of experts.

### *Illustrations.*

(a). The question is, whether A was poisoned by a certain poison. The fact that other persons, who were poisoned by that poison, exhibited certain symptoms which experts affirm or deny to be the symptoms of that poison, is relevant.

(b). The question is, whether an obstruction to a harbour is caused by a certain sea-wall. The fact that other harbours similarly situated in other respects, but where there were no such sea-walls, began to be obstructed at about the same time, is relevant.

**Scope of the Section.**—It seems that this section makes facts and statements, whether by competent witnesses or by treatises of recognized authority in the science, art, calling or the like, to which the testimony of an expert relates, which support or are inconsistent with the opinion of such expert, admissible in evidence together with the grounds of such opinion. It is an exception to the rule excluding evidence of collateral facts.

Illustration (b) is taken from the case of *Fawkes v. Chadd*, 3 Doug. 157. The point in dispute in this case was, whether a sea-wall had caused the choking up of a harbour, and engineers were called to give their opinions as to the effect of the wall, proof that other harbours on the same coast, where there were no embankments, had begun to be choked about the same time as the harbour in question

was admitted, as such evidence served to elucidate the reasoning of the skilled witnesses.

47. When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

Opinion as to  
handwriting  
when relevant.

*Explanation.*—A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

### *Illustration.*

The question is, whether a given letter is in the handwriting of A, a merchant in London. B is a merchant in Calcutta, who has written letters addressed to A and received letters purporting to be written by him. C is B's clerk, whose duty it was to examine and file B's correspondence. D is B's broker, to whom B habitually submitted the letters purporting to be written by A for the purpose of advising with him thereon. The opinions of B, C and D on the question whether the letter is in the handwriting of A are relevant, though neither B, C nor D ever saw A write.

*Scope of the Section.*—The Code provides three indirect ways of proving the handwriting of the man alleged to have written the document in question. Section 45 makes relevant the opinion on such a point, of a witness skilled in the art of distinguishing writings ;

this section admits the opinion of any witness acquainted with the handwriting of the person alleged to have written the document ; and section 73 allows the Court to hold a comparison of signature with admitted or proved signatures.

**Methods of proving Handwriting.**—Mr. Field speaks of five methods of proving handwriting : 1st—The simplest method is to call the *writer* himself ; 2nd—Any person who *actually saw the paper or signature written* may be called to prove it ; 3rd—A witness may be called who has obtained a knowledge of, and acquaintance with, the person's handwriting in question by seeing that person write on other occasions ; 4th—The handwriting may be proved by the evidence of a witness who has acquired a knowledge thereof by having *seen in the ordinary course of business documents* proved, or which may be reasonably presumed to have been written by the person, whose handwriting forms the subject of inquiry ; 5th—Handwriting may be proved by comparison of two or more writings.—Field's Evi. Act, 5th Ed., 348.

If a witness does not undertake to swear that he believes a particular writing to be in the handwriting of a person, but simply says that he thinks it to be like his writing, such a statement ought not to be admitted as evidence. But as a matter of fact such irresponsible statements are generally admitted by our Law Courts.

48. When the Court has to form an opinion as to the existence of any general custom or right, the opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed, are relevant.

Opinion as to existence of right, or custom, when relevant.

**Explanation.**—The expression 'general custom or right' includes customs or rights common to any considerable class of persons.

#### *Illustration.*

The right of the villagers of a particular village to use the water of a particular well is a general right within the meaning of this section.

**General.**—The English law draws a distinction between the terms *general* and *public*. The term *public* is strictly applied to that which

concerns every member of the state ; the term *general* is confined to a lessor, though still a considerable portion of the community. The explanation to the present section shows that the term *general* has been here used in the sense in which it is used by English writers. The distinction drawn between the terms *general* and *public* is not intended to be maintained here, as the term *public* includes the term *general*, and consequently every public right or custom is necessarily a general one. *Vide ante* p. 132.

**Opinions Relevant under this Section.**—The opinions of persons, likely to know, about village rights to pasturage, to use of paths, water-courses, or ferries, to collect fuel, to use tanks and bathing ghâts, mercantile usage and local customs, would be relevant under this section.—Cun. Evi., 191. *Vide also ante* p. 132. (Examples of matters of public and general interest).

**Wajib-ul-arz.**—(a). Their Lordships of the Privy Council were inclined to hold that *Wajib-ul-arz* or village administration papers prepared and attested by settlement officers, in pursuance of Regulation VII of 1822, are admissible in evidence under this section and section 49, in order to prove a family custom of inheritance stated therein, as the record of opinions as to the existence of such custom by persons likely to know it—*Vide Lekraj Kuar v. Mahpal Singh*, 5 Cal. 744.

(b). A settlement officer should not receive for entry in the *Wajib-ul-arz* of a village the mere expression of the views of a proprietor, or enter it upon the records relating to the village, the *Wajib-ul-arz* being intended to be the record of local customs—*Uman Parshad v. Gandharp Singh*, I. L. R. 15 Cal. 20.

49. When the Court has to form an opinion as to the usages and tenets of any body of men or family, the constitution and government of any religious or charitable foundation, or the meaning of words or terms used in particular districts or by particular classes of people, the opinions of persons having special means of knowledge thereon, are relevant facts.

**Scope of the Section.**—This section makes the opinions of witnesses, having *special means of knowledge*, admissible in evidence upon the following matters : 1st—The usages and tenets of any body of men

Opinions as to  
usages, tenets, &c.,  
when relevant.

or family ; 2nd—The constitution and government of any religious or charitable foundation ; 3rd—The meaning of words or terms used in particular districts or by particular classes of people.

**Family Custom.**—As to family customs see notes under section 13.

**Religious and Charitable Institutions.**—As to religious or charitable institutions *vide* Bengal Regulation XIX of 1810 ; Act XX of 1863 ; Act VII (Bom.) of 1865 ; and Madras Regulation VII of 1817.

**Meaning of Words, &c.**—As to meaning of words or terms *vide* section 98.

**Books of Reference.**—The penultimate paragraph of section 57 allows the Court to consult appropriate books or documents of reference on all matters of literature, science or art.

50. When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact : Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, or in prosecutions under section four hundred and ninety-four, four hundred and ninety-five, four hundred and ninety-seven or four hundred and ninety-eight of the Indian Penal Code.

Opinion on relationship, when relevant.

### *Illustrations.*

(a). The question is, whether A and B were married. The fact that they were usually received and treated by their friends as husband and wife, is relevant.

(b). The question is, whether A was the legitimate son of B. The fact that A was always treated as such by members of the family, is relevant.

**Sections referred to.**—The sections mentioned above relate to the following offences :—

Sec. 494, I. P. C.—Marrying again in the lifetime of husband or wife.

Sec. 495, I. P. C.—Marrying again in the lifetime of husband or wife, having concealed from the person with whom the subsequent marriage is contracted, the fact of the former marriage.

Sec. 497, I. P. C.—Adultery.

Sec. 498, I. P. C.—Taking or enticing away another man's wife from that man or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with another person or concealing or detaining with that intent any such woman.

The Indian Divorce Act is Act IV of 1869.

**Scope of the Section.**—This section affords an exceptional way of proving a relationship. It makes admissible as evidence the mere opinion, *expressed by conduct*, of a person who, as a member of the family or otherwise, has special means of knowledge, to prove the existence of a relationship such as marriage except in the cases herein mentioned. That proof of the opinion, as expressed by conduct, may be given, seems to imply that the person himself is not to be called to state his own opinion, but that, when he is dead or cannot be called his conduct may be proved by others.\*

**Opinion expressed by conduct.**—(a). In the *Berkeley Peerage* case, 4 Camp. 416, Mansfield C. J. observed: "If the father is proved to have brought up the party as his legitimate son, this amounts to an assertion that the son is legitimate."

(b). Continual co-habitation and acknowledgment of parentage by a consecutive course of treatment will establish marriage and legitimacy among Mahomedans—*Khajah Hedayat Ollah v. Rai Jan Khanum*, 3 Moo. I. A. 295. *Vide also Mahomed Bauker Hossein Khan Bahadoor v. Shurfoonnissa Begum*, 18 Moo. I. A. 136; *Mahatala Bibi v. Prince Ahmed Hales Moojooman*, 10 C. L. R. 293.

(c). Where in a transaction with a third party, A describes B as his son, and B speaks of A as his father, the acknowledgment of sonship is complete—*Naba Kant Roy v. Mahatab Bibi*, 20 W. R. 164.

(d). Where a son has been uniformly treated by his father and all the members of the family as legitimate, a presumption arises under the Mahomedan law that the son's mother was his father's wife—*Khajooroonissa v. Rowshan Jehan*, I. L. R. 2 Cal. (P. C.) 184.

**Proviso.**—(a). The provisions of this section, it has been held by a Full Bench, show that where marriage is an ingredient in the offence as in bigamy, adultery, and the enticing away of married

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\* *Vide Queen-Empress v. Subbarayan*, I. L. R. 9 Mad. 9.

women, the fact of the marriage must be strictly proved in the regular way—*Empress v. Pitamber Singh*, I. L. R. 5 Cal. 566.

(b). K was accused by D, of raping P, alleged to be D's wife, and was convicted on the charge of adultery. The evidence of marriage between D and P consisted of their statements that they were married to each other, and of a statement by K that P was D's wife. The High Court held that such evidence was not sufficient to establish the vital incident to the charge of adultery, namely, the marital relation of D and P—(*Empress v. Pitamber Singh* concurred in)—*Empress of India v. Kallee*, I. L. R. 5 All. 233.

(c). To justify a conviction under sec. 498, I. P. C., it is not sufficient for the prosecution to prove that the complainant and the woman, in respect of whom the charge is made, lived together as man and wife. It is necessary that facts constituting a valid marriage should be proved—*Empress v. Arshed Ali*, 13 C. L. R. 125.

(d). To prove marriage according to Mahomedan law it is necessary to prove that a Mollah was present with the necessary witnesses and vakils and read the *sigha* (formula); that the *akd* was performed; and the ceremonies usual at a Mahomedan marriage in this country were performed—*Badal Aurat v. Queen-Empress*, I. L. R. 19 Cal. 79.

(e). The Madras High Court, in the case of *Queen-Empress v. Subbarayan*, I. L. R. 9 Mad. 9, discussed *Empress v. Pitambur Singh*, I. L. R. 5 Cal. 566, and held that the evidence of the complainant, the woman and her mother, who swore to the fact of the marriage, and who were not cross-examined by the accused as to the fact or validity of the marriage, was held sufficient evidence of marriage to support a conviction under sec. 498, I. P. C.

51. Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.

Grounds of opinion, when relevant.

### Illustration.

An expert may give an account of experiments performed by him for the purpose of forming his opinion.

See notes to secs. 8 and 11.

This section should be read along with sec. 46.

In all cases of opinion evidence the grounds on which the judgment of the witness is formed may be inquired into, because the correctness



or otherwise of such opinion may be estimated in many instances on the grounds upon which it is based, being known.

In *Stephenson v. The River Tyne Improvement Commissioners*, 17 (English) W. R. 590, it was held that a skilled witness may not only say that he formed an opinion but that he *acted on that opinion*, his acting thereon being a strong corroboration of the truth of the opinion.

### *Character when relevant.*

52. In civil cases, the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him, is irrelevant, except in so far as such character appears from facts otherwise relevant.

In civil cases character to prove conduct imputed, irrelevant.

Sections 52 and 55 relate to civil cases. Sections 53 and 54 relate to criminal proceedings only.

By the explanation to sec. 55 the word 'character' in this section includes both reputation and disposition ; but evidence may be given only of general reputation and general disposition and not of particular acts by which reputation or disposition were shown.

'Person concerned' means person whose conduct is relevant to the suit.

As to witnesses *vide* sections 145, 146, 153 and 155.

If character be in issue strictly, or if the fact that a party is of a particular character or reputation be a fact relevant to the issue, as affecting the measure of damages or otherwise the rule excluding character evidence has no application *vide* section 55 *post*.

In criminal cases, previous good character relevant.

53. In criminal proceedings, the fact that the person accused is of a good character, is relevant.

*Vide* notes to secs. 52 and 54.

**Importance of Character Evidence.**—Evidence of good character is admissible as it is of the utmost importance in explaining the conduct of an accused person and in judging of his innocence or guilt.

Sir J. F. J. Stephen in his Introduction to the Evidence Act says : "The sections as to character require little remark. Evidence of character is, generally speaking, only a makeweight, though there are two classes of cases in which it is highly important : (1) Where conduct is equivocal, or even presumably criminal. In this case evidence of character may explain conduct and rebut the presumptions which it might raise in the absence of such evidence. A man is found in possession of stolen goods. He says he found them and took charge of them to give them to the owner. If he is a man of very high character this may be believed. (2) When a charge rests on the direct testimony of a single witness, and on the bare denial of it by the person charged. A man is accused of an indecent assault by a woman with whom he was accidentally left alone. He denies it. Here a high character for morality on the part of the accused person would be of great importance." In his "General view of the Criminal Law of England, 311-312," he makes the following observations on character evidence. He says : "Though general evidence of bad character is not admitted against the prisoner, general evidence of good character is always admitted in his favor. This would, no doubt, be an inconsistency justifiable, or at least intelligible, on the ground of the humanity of English law, if such evidence were not often of great importance as tending to *explain conduct*. A loses his watch ; B is found in possession of it next day, and says he found it, and was keeping it for the owner. If A and B are strangers, and if B can call no one to speak to his character, this is a very poor excuse ; but if B is a friend of A's, and of the same position in life, and if he calls many respectable people, who have known him from childhood, and say he is a perfectly honest man, the story becomes highly probable. If the same thing happened to a thoroughly respectable, well-established inhabitant of the town, say, for instance, to the Rector of the Parish, being a man of first-rate character and large fortune, no one would think twice of it. These illustrations give the true theory of evidence of character. Judges frequently tell juries that evidence of character cannot be of use where the case is clearly proved except in mitigation (or, possibly, aggravation) of punishment ; but that, if they have any doubt, evidence of character is highly important. This always seems to me to be equivalent to saying, 'If you think the prisoner guilty, say so ; and if you think you ought to acquit him independently of the evidence of character acquit him rather the more readily because of it.' Evidence of character would thus be superfluous in every case. The *true distinction is, that evidence of character may explain conduct, but cannot alter facts.*"

54. In criminal proceedings, the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

Previous bad character not relevant, except in reply.

*Explanation 1.*—This section does not apply to cases in which the bad character of any person is itself a fact in issue.

*Explanation 2.*—A previous conviction is relevant as evidence of bad character.

This section has been substituted by section 6, Act III of 1891.

**Reasons for framing the Original Section.**—The English law does not allow evidence of a previous conviction until the passing of the sentence. The French law allows the whole antecedents of an accused person to be raked up against him—to be put into evidence, to be made the ground of interrogatories to the accused and his conduct generally to be the basis of arguments against him. Mr. Stephen, in framing sec. 54, wanted to steer a middle course. The section, as originally framed, did not allow evidence of bad character to be put in, but allowed evidence of previous convictions even as a matter of prejudice, against the accused. He excluded evidence of bad character on the ground that “a man’s general bad character is a weak reason for believing that he was concerned in any particular criminal transaction, for it is a circumstance common to him and hundreds and thousands of other people; whereas the opportunity of committing the crime and facts immediately concerned with it are marks which belong to very few, perhaps only to one or two persons. If general bad character is too remote, *a fortiori*, the particular transactions of which that general bad character is the effect are still further removed from proof; accordingly it is an inflexible rule of English criminal law to exclude evidence of such transactions.” The reason which led him to make previous conviction relevant evidence, is given in the first report of the Select Committee, in the following words: “We include under the word ‘character’ both reputation and disposition, and we permit evidence to be given of previous convictions against a prisoner for the purpose of prejudicing him. We do not see why he should not be prejudiced by such evidence, if it is true.”

**Reasons for the amended Section.**—In the case of *Queen-Empress v. Kartick Chunder Das*, I. L. R. 14 Cal. 721, the Full Bench was asked to say whether under the former section a previous conviction was in all cases admissible in evidence against an accused person or not, and Pigot J., in delivering the judgment of the Bench made the following observations: "We felt, as we have said, that the indiscriminate admission against an accused person of any previous conviction against him would not merely operate in many cases so as to work what we should have called an unjust and unreasoning prejudice; but also that, by the construction contended for on behalf of the prosecution, a formidable novelty must be admitted into the rules of evidence applied in criminal proceedings; for in a multitude of cases the section, by this construction, renders admissible, and declares by its statutory force to be relevant facts which, in no possible sense, save the technical statutory sense in which the word is used in the Act, could be relevant. . . . We cannot disregard the fact that the committee deputed to frame, and to advise the Legislature upon the proposed Code, framed this section and advised its adoption to secure the result so described; and that the Legislature being so advised, passed the section so framed. We think we must treat it as plainly shown that the danger which, as we are disposed to hold, the Legislature must be supposed to have intended to avoid, was, in truth, the object which the Legislature sought to attain. It is stated in language plain, forcible and concise. The Legislature let in the evidence for the purpose of prejudicing the man upon his trial. . . . We are constrained to answer this reference by saying that previous convictions are in every case admissible. That must be the law so long as this section (original sec. 54) remains unaltered. We own that, could we have come to any other conclusion, we should have done so; but it is our duty to carry out the intentions of the Legislature." In consequence of this decision the Legislative Council passed Act III of 1891, amending the former section.

**Evidence of Bad Character when Relevant.**—The general rule is that it is not competent to give evidence of the bad character or disposition of an accused person with the view of raising an unfavourable presumption against him, because the sound policy of law requires that even the worst criminal shall receive a fair and unprejudiced trial. But such evidence is admissible: 1st—Where the very nature of the proceedings is such as to put in issue the character of the accused. Thus in proceedings under sec. 107, Criminal Procedure Code, evidence of bad character is relevant under sec. 5 *ante*. In an action for seduction, the character of the female for chastity is directly in issue, and may be impeached either

by general evidence of misconduct, or proof of particular acts of it. So a charge of rape, or of assault with intent to commit rape, brings the question of the chastity of the female so far in issue, that it is competent to the accused to give general evidence of her previous bad character in this respect.\* 2nd—If evidence is given to the effect that the accused has a good character, the prosecution may tender evidence of his bad character to rebut that evidence.

**Evidence of Previous Conviction when Relevant.**—1st—When evidence of good character is given by an accused person, the fact that he has been previously convicted of an offence is admissible as evidence of bad character. 2nd—A previous conviction may be proved in cases in which the accused is liable to enhanced punishment on account of such previous conviction.

As to the proper time for letting in evidence of previous convictions refer to sec. 310 of the Criminal Procedure Code.

55. In civil cases, the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant.

Character as  
affecting da-  
mages.

*Explanation.*—In sections fifty-two, fifty-three, fifty-four and fifty-five, the word ‘character’ includes both reputation and disposition; but [except as provided in sec. 54] evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown.

**Scope of the Section.**—According to the law of England, not only evidence of general bad character in mitigation of damages is admissible, but the defendant may even prove particular acts of immorality and indecorum. This section, however, shuts out evidence of particular acts, and admits evidence of general character only.

**Instances.**—(a). In actions of breach of promise of marriage, the defendant may prove in mitigation of damages that the plaintiff is a person, either of bad character, or of coarse and brutal manners.—Taylor, sec. 358.

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\* Vide Best Evl., 245-246.

(b). In an action for defamation, evidence of plaintiff's general character may be given, and it may be shown that at the time of the publication of the libel the plaintiff laboured under a general suspicion of having been guilty of the charges imputed to him by the defendant, as affecting the question of damages.—Taylor, sec. 359.

(c). In an action for libel, evidence of the plaintiff's general bad character is admissible in mitigation of damages, but evidence of rumours before the publication of the libel that the plaintiff had committed the offences charged in it and evidence that the plaintiff was in the habit of committing offences of a like kind, is too remote, and inadmissible—*Scott v. Sampson*, L. R. 8 Q. B. D. 491.

**Character Evidence Generally.**—That the general reputation and previous conduct of a litigant party or witness is often of immense weight as natural or moral evidence, as tending to raise a presumption that his action or defence is well founded, or that the evidence which he gives is true or false, must be obvious. But, on the other hand, the exposing every man who comes into our Courts of Justice, to have every action of his life publicly scrutinised, would keep most men out of them. To admit character evidence in every case, or to reject it in every case, would be equally fatal to justice; and to draw the line to define with precision where it ought to be received, and where it ought to be rejected, is as embarrassing a problem as any Legislator can be called upon to solve.\* There are many cases in which the most innocent man has no answer to oppose to a criminal charge, but his reputation and character evidence generally assists the jury, in estimating the value of the evidence brought against him. But few subjects are more liable to be misunderstood than character evidence; and as witnesses often fail to make a proper estimate of others' character and as perjury in giving false characters for honesty, &c., often go undetected, Judges are naturally inclined to look on such evidence with suspicion and to attach little weight to it. Holt C. J. has very shrewdly observed that, "A man is not born a knave, there must be time to make him so, nor is he presently discovered after he becomes one. A man may be reputed an able man this year, and yet be a beggar the next." It should, however, be remembered that whenever it is allowable to impeach the character of a party, it is competent to the other side to give evidence to contradict the evidence adduced.

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\* *Vide Best Evi.*, 245.

## PART II.

## ON PROOF.

Proof means anything which serves either immediately or mediately to convince the mind of the truth or falsehood of a fact or proposition ; and as truths differ the proofs adopted to them differ also. —Best, sec. 10.

A thing is said to be proved when the Court after considering the matters before it, either believes the thing, to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. Chapter II gives a group of facts, among which the evidence, which is the ground for this inference, must be shown to fall ; and the sections in Part II show how each of these facts must be proved.

In criminal matters, there are some special rules as to proof, embodied in the Code of Criminal Procedure.

*General Scheme of Part II.*—Part II consists of four chapters, containing 45 sections (56-100). Its scheme is expressed in a few propositions by Sir J. F. Stephen, thus :—

“ 1. Certain facts are so notorious in themselves,  
Judicial notice.
or are stated in so authentic a manner,  
in well-known and accessible publications,  
that they require no proof. The Court,  
if it does not know them, can inform itself upon  
them without formally taking evidence. These  
facts are said to be judicially noticed.

“ 2. All facts except the contents of documents may be proved by oral evidence, which must in all cases be direct. That is, it must consist of a declaration by the witness that he perceived by his own senses the fact to which he testifies.

“ 3. The contents of documents must be proved either by the production of the document, which is called primary evidence, or by copies or oral accounts of the contents, which are called secondary evidence. Primary evidence is required as a rule, but this is subject to seven important exceptions in which secondary evidence may be given. The most important of these are (1) cases in which the document is in the possession of the adverse party, in which case the adverse party must in general (though there are several exceptions) have notice to produce the document before secondary evidence of it can be given. “And (2) cases in which certified copies of public documents are admissible in place of the documents themselves.

“ 4. Many classes of documents which are defined in the Act, are presumed to be what they purport to be, but this presumption is liable to be rebutted. Two sets of presumptions will sometimes apply to the same document. For instance, what purports to be a certified copy of a record of evidence is produced. It must by section 76 be presumed to be an accurate copy of the record of evidence. By sec. 80 the facts stated in the record itself as to circumstances under which it was taken, *e.g.*, that



it was read over to the witness in a language which he understood, must be presumed to be true.

“ 5. When a contract, grant or other disposition of property is reduced to writing, the writing itself (or secondary evidence of its contents) is not only the best, but is the only admissible evidence of the matter it contains. It cannot be varied by oral evidence, except in certain specified cases.

“ It is necessary in applying these general doctrines (the expediency of which is obvious) to practice to go into considerable detail, and to introduce provisos, exceptions, and qualifications which appear more intricate and difficult than they really are. If, however, the propositions just stated are once distinctly understood and borne in mind, the details will be easily mastered when the occasion for applying them arise. The provisions in the Act are all made in order to meet real difficulties which arose in practice in England, and which must of necessity arise over and over again, and give occasion to litigation unless they were specifically provided for beforehand.

“ One single principle runs through all the positions relating to documentary evidence. It is that the very object for which writing is used to perpetuate the memory of what is written, and so to furnish permanent proof of it. In order that full effect may be given to this, two things are necessary, namely, that the document itself should, whenever it is possible, be put before the Judge for his

Writing when  
exclusive evi-  
dence.

Principle of  
provisions in do-  
cumentary evi-  
dence.

inspection, and that if it purports to be a final settlement of a previous negotiation, as in the case of a written contract, it shall be treated as final, and shall not be varied by word of mouth. If the first of these rules were not observed the benefit of writing would be lost. There is no use in writing a thing down unless the writing is read. If the second rule were not observed people would never know when a question was settled, as they would be able to play fast and loose with their writings.

“By bearing these leading principles in mind the details and exceptions will become simple. Their practical importance is indeed as nothing in comparison to the importance of the rules which they qualify.”

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### CHAPTER III.

#### FACTS WHICH NEED NOT BE PROVED.

Fact judicially  
noticeable need  
not be proved.

56. No fact of which the Court will take judicial notice need be proved.

As to facts which need not be proved, but are admitted.—See sec. 58, *post*.

No party is required to furnish evidence concerning any fact of which the Court will take judicial notice,—unless and until the Court declines to take such judicial notice, or requires that evidence be furnished of such fact.

Facts of which  
Court must take  
judicial notice.

57. The Court shall take judicial notice of the following facts :—

(1). All laws or rules having the force of law now or heretofore in force or hereafter to be in force, in any part of British India :

(2). All public Acts passed or hereafter to be passed by Parliament, and all local and personal Acts directed by Parliament to be judicially noticed :

(3). Articles of War for Her Majesty's Army or Navy :

(4). The course of proceeding of Parliament and of the Councils for the purposes of making Laws and Regulations established under the Indian Councils Act, or any other law for the time being relating thereto :

*Explanation.*—The word 'Parliament,' in clauses (two) and (four) includes : 1—The Parliament of the United Kingdom of Great Britain and Ireland ; 2—The Parliament of Great Britain ; 3—The Parliament of England ; 4—The Parliament of Scotland ; and 5—The Parliament of Ireland :

(5). The accession and the sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland :

(6). All seals of which English Courts take judicial notice : the seals of all the Courts of British India, and of all Courts out of British India, established by the authority of the Governor-General or any local Government in Council : the seals of Courts of Admiralty and Maritime Jurisdiction and of Notaries Public, and all seals which any person is authorised to sue by any Act of Parliament or other Act or Regulation having the force of law in British India :

(7). The accession to office, names, titles, functions, and signatures of the persons filling for the time being any public office in any part of British India, if the fact of their appointment to such office is notified in the *Gazette of India*, or in the official Gazette of any Local Government :

(8). The existence, title, and national flag of every State or Sovereign recognised by the British Crown :

(9). The divisions of time, the geographical divisions of the world, and public festivals, fasts and holidays notified in the official Gazette :

(10). The territories under the dominion of the British Crown :

(11). The commencement, continuance, and termination of hostilities between the British Crown and any other State or body of persons :

(12). The names of the members and officers of the Court, and of their deputies and subordinate officers and assistants, and also of all officers acting, in execution of its process, and of all advocates, attornies, proctors, vakils, pleaders, and other persons authorized by law to appear or act before it :

(13). The rule of the road on land or at sea.

In all these cases, and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference.

If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do

so, unless and until such person produces any such book or document as it may consider necessary to enable it to do so.

**List not Exhaustive.**—The list of matters judicially noticed is not intended to be quite complete. It is compiled from 1 Ph. Ev., 458-67. It may be doubted whether an absolutely complete list could be formed, as it is practically impossible to enumerate everything which is so notorious in itself, or so distinctly recorded by public authority that it would be superfluous to prove it.—Steph. Digest, 176. Mr. Whitley Stokes, in his edition of the Anglo-Indian Codes, Vol. II, p. 887, says: "Anglo-Indian Courts take judicial notice of the ordinary course of nature, the meaning of English words, and all other matters which they are directed by any other Act to notice, such as, in Bengal, lists of land-holders, who have not made road cess returns (Beng. Act IX of 1880, sec. 19); in Madras, By-laws framed by the Commissioners of Police (Mad. Act III of 1862, sec. 5); in Bombay, notifications in the Gazette (Bom. Act X of 1866, sec. 4); in Oudh, the list of talukdars and grantees published by the Chief Commissioner (Act I of 1869, sec. 10)." That a foreign state has not been recognised by Her Majesty or by the Governor-General in Council, is to be judicially noticed. (*Vide* Act XIV of 1882, sec. 431).

**Public Act.**—A *public* or general Act is a universal rule applied to the whole community, which the Courts must notice judicially and *ex-officio*, although not formally set forth by a party claiming an advantage under it. Every Act made after the 4th February 1861 shall be deemed to be a public Act and shall be judicially taken notice of as such, unless the contrary be expressly provided in such Act.—13 and 14 Vic. Cap. 21, sec. 7.

**Mahomedan Ecclesiastical Law.**—The Court is bound to take judicial notice of Mahomedan Ecclesiastical Law under this section, cl. 1, and the rules of that law need not be proved by specific evidence—*Queen-Empress v. Ramkan*, I. L. R. 7 All. 461.

**Articles of War.**—*Vide* Act V of 1869.

**Seals.**—(a). The seals of which English Courts would take judicial notice have been enumerated by Taylor in his Evidence. *Vide* sec. 6.

(b). A document purporting to be a copy of a decision passed by one Abdullah as Kazi or Sudder Ameen of Chittagong, in 1820, having been tendered in evidence, it appeared that the seal was not distinctly legible. The fact of the appointment of Abdullah was not

proved, nor was it shown that in 1820 there existed any official Gazette in which the appointment of Kazis or Sudder Ameens were usually notified. There was further no certificate that the copy was a true copy. *Held*, that the Court could not take judicial notice of the appointment of Abdullah under cl. 7 of this section, nor of the seal under cl. 6, and that therefore no presumption could be made in favour of the document as being more than 30 years old—*Jaker Ali Chowdhry v. Raj Chunder Sen*, 10 C. L. R. 469.

(c). In the case of *Kristo Nath Kundoo v. T. F. Brown*, I. L. R. 14 Cal. 176, the Court admitted under this section a registered power-of-attorney without proof, the registering officer being a Court under sec. 3.

**Signatures.**—In the case of *Tamon Singh v. Kalidas Rai*, 4 B. L. R. O. J. 51, the Court took judicial notice of a jailor's signature under sec. 16 of the Prisoners' Testimony Act, XV of 1869.

**Divisions of Time, &c.**—Judicial notice may be taken of the several eras current in India, and the usual almanacs may be referred to. The Indian Limitation Act assumes that all instruments have been made with reference to the Gregorian Calendar.

**British Territories.**—*Vide* 6 and 7 Vic. Cap., 94.

**Recognition of Independent State.**—(a). Where there is a civil war and one part of a nation establishes itself as an independent Government, the Judges are bound, *ex-officio*, to know whether or not the Government has recognised such part as an Independent State.—Taylor, sec. 4.

(b). The existence of war or peace between England and a foreign country is matter of notoriety and need not be expressly proved—*Lord George Gordon's Case*, 22 S. T. 230.

**Books of Reference.**—(a). A Court will exercise a wise discretion in allowing a well-known treatise such as Taylor on Medical Jurisprudence to be referred to in cases depending upon medical evidence—*Hurry Charn Chuckerbutty v. The Empress*, I. L. R. 10 Cal. 140.

(b). In the case of *Hatim v. Empress*, 12 C. L. R. 86, reference was made to Taylor's Medical Jurisprudence under the provisions of the penultimate paragraph of this section and the first proviso of sec. 60.

(c). Free reference was made to books on History, Political Economy, &c., in the well-known case of *Thakurani Dasi v. Bissessar Mukharji*, 3 W. R. (Act X) 29.

(d). In this connection refer to the following cases also :—

1. *Vallubha v. Madusudan*, I. L. R. 12 Mad. 495.

2. *Augustine v. Medlycott*, I. L. R. 15 Mad. 241.

3. *The Collector of Madura v. Matu Ramalinga Sathupathi*, 12 Moo. I. A. 397.

58. No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings :

Facts admitted  
need not be  
proved.

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

*Vide* Civil Procedure Code, section 128, and sec. 67 *post*.

An accused may admit at the trial such facts as he pleases to admit. The English law is otherwise, see *Steph. Digest*, art. 60.

**Implied Admissions.**—(a). The English law on the point of implied admissions is thus laid down. "It may be laid down broadly that whenever a material averment, well pleaded, is passed over by the adverse party without denial, whether it be by pleading in confession and avoidance or by traversing some other matter, or by demurring in law, or by suffering judgment to go by default, it is thereby for the purpose of pleading, if not for the purpose of trial before the jury, conclusively admitted."—Taylor, sec. 824. Such rigidity is foreign to Indian Procedure. In our Courts, documents, not expressly admitted, must be proved, and parties are under the necessity of proving by competent evidence the case which they set up.

(b). An admission of a fact on the pleadings by implication is not an admission for any other purpose than that of the particular issue, and is not tantamount to proof of the fact—*Amirtalal Bose v. Rajani Kant Mitter*, 23 W. R. (P. C.) 24.

**Effect of Admission.**—The defendant, in a suit for specific performance of an agreement, admitted in his written statement the terms of the agreement and its execution ; it was held, that the plaintiff was not called upon to prove the execution of the document or put it in evidence—*Burjarji Cursetji Pantheki v. Muncherji Kuverji*, I. L. R. 5 Bom. 143.

## CHAPTER IV.

## OF ORAL EVIDENCE.

**59.** All facts, except the contents of documents, may be proved by oral evidence.

Proof of facts  
by oral evidence.

Oral evidence should receive its due weight and not be rejected from a general distrust of native testimony nor perjury widely imputed without some grave grounds to support the imputation. The Act lays it down that oral evidence is legally sufficient to prove any disputed fact, except the contents of documents, but its value is to be weighed having regard to the nature and circumstances of each particular case.

**Instances.**—(a). Oral evidence, if credible, is legally sufficient to prove a prescriptive title—*Meharban Khan v. Muhboob Khan*, 7 W. R. 462.

(b). In a suit brought on an allegation of forcible dispossession, oral evidence, if credible and pertinent, is sufficient to establish the fact of possession—*Shao Suhaye Rai v. Goodur Roy*, 8 W. R. 328.

(c). Oral testimony, if worthy of credit, is sufficient without documentary evidence to prove a fact or a title—*Ram Soonder Mondul v. Akima Bibi*, 8 W. R. 368. *Vide Girdharee Lal Singh v. Modho Roy*, 18 W. R. 323.

(d). Oral evidence is sufficient to prove boundaries—*Rani Sarat Sundari Dabi v. Rajendra Kisore Ray Chowdhory*, 9 W. R. 125. But see *Goluck Chunder Boss v. Raja Nurrender Bahadoor*, W. R. (1864) 135. In this case Steer J. remarked: 'Oral evidence in a boundary dispute is as a rule quite insufficient to establish either the fact of possession or of title.'

(e). Oral evidence, if credible, is sufficient to prove, without a pottah and kabooliet, the quantity of the defendant's *nukdes kaski* land and the amount of its rent—*Dinoo Singh v. Doorga Pershad*, 18 W. R. 348.

(f). The adjustment of an account may be proved by oral evidence—*Purnima Chaudhrain v. Nityanand Saha*, B. L. R. Sup. Vol. (F. B.) 3.



(g). Payment of money may be proved by oral evidence, even if there be a written receipt not produced—*Dalip Singh v. Durga Prasad*, I. L. R. 1 All. 442.

(h). Oral evidence is admissible to prove payment of a bond debt, even if there be a clause in the bond to the effect that all payments are to be entered on the back of the bond and no payment is to be deemed to have been made if not so entered—*Narayan Umdir Patel v. Mati Lal Ramdas*, I. L. R. 1 Bom. 45.

Oral evidence  
must be direct.

60. Oral evidence must, in all cases, whatever, be direct ; that is to say :—

If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it :

If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it :

If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner :

If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds :

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable :

Provided also that, if oral evidence refers to the existence or condition of any material thing other

than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

**Object of the Section.**—This section asserts that whatever may be the relation of a fact to be proved to the fact in issue, it must, if proved by oral evidence, be proved by direct evidence. For instance, if it were to be proved that A, who died fifty years ago, said that he had heard from his father B, who died 100 years ago, that A's grandfather C had told B that D, C's elder brother, died without issue, A's statement must be proved by some one who, with his own ears, heard him make it. If (as in the case of verbal slander) the speaking of the words was the very point in issue, they must be proved in precisely the same way.\* Referring to this section, the Select Committee said: "This provision taken in connection with the provisions on relevancy contained in Chapter II will, we hope, set the whole doctrine of hearsay in a perfectly plain light, for their joint effect is this: 1st—The sayings and doings of third persons are, as a rule, irrelevant, so that no proof of them can be admitted; 2nd—In some excepted cases they are relevant; 3rd—Every act done or word spoken, which is relevant on any ground, must (if proved by oral evidence) be proved by some one who saw it with his own eyes or heard it with his own ears."

**Scope of the Section.**—"This section provides that when it (the oral evidence) refers to a fact which could be seen, it (the oral evidence) must be the evidence of a witness who says he saw it. The last 'it' is somewhat indefinite; but I think that this 'it' has reference to the 'fact' previously spoken of; and I think the fact previously spoken of is the fact deposed to; and therefore not always the fact which it is ultimately intended to prove. In other words, I do not think it was intended by this section to exclude circumstantial evidence of things which could be seen, heard, and felt, though the wording of the section is undoubtedly ambiguous, and at first sight might appear to have that meaning. *Vide* remarks of Markby J. in the case of *Nil Kanto Pandit v. Juggobundhu Ghose*, 12 B. L. R. (App.) 18.

**Direct.**—That is, the evidence must consist of a declaration by the witness that he perceived by his own senses the fact to which he testifies. The word 'direct' is here used as opposed to mediate or derivative or what is generally called 'hearsay.'

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\* *Vide* Step. Digest, 177.

**Reasons for excluding Derivative Evidence.**—"The foundations of the rule lie much deeper than this. Instead of stating as a maxim that the law requires all evidence to be given on *oath*, we should say that the law requires all evidence to be given *under personal responsibility*, i.e., every witness must give his testimony, under such circumstances as expose him to all the penalties of falsehood, which may be inflicted by any of the sanctions of truth. The true principle therefore appears to be this,—that all second-hand evidence, whether of the contents of a document or of the language of a third person, which is not connected by *responsible* testimony with the party against whom it is offered, is to be rejected."—Best, 8th Ed., 435.

**Proviso 1.**—This proviso should be read with sections 45 and 46 *ante*. The English law does not admit such evidence.

*Vide* note to sec. 57 *ante*.

**Proviso 2.**—*Vide* note to sec. 3., p. 11.

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## CHAPTER V.

### OF DOCUMENTARY EVIDENCE.

61. The contents of documents may be proved  
Proof of contents of documents. either by primary or by secondary evidence.

**Scope of the Section.**—This section does not override the laws as to Stamps and Registration. It is, therefore, the first business of the Court to satisfy itself whether a document tendered is admissible at all. If it is clearly no evidence between the parties, or otherwise inadmissible, it should be rejected at once. The documentary evidence which is admissible may be divided into two classes; one class which requires no proof and another class which requires proof. If a document comes under the latter class, the general rule is that its contents should be proved by primary evidence. It is a cardinal rule of evidence, not one of technicality, but of substance, which it is dangerous to depart from, that where written documents exist, they shall be produced as being the best evidence of their contents. Primary evidence is required as a rule, but this is subject to seven

important exceptions in which secondary evidence may be given.  
*Vide sec. 65 post.*

**Secondary Evidence.**—The rules as to the admission of secondary evidence are subordinate to, or exceptions from, the cardinal rule that a party to a contentious suit must produce the best evidence in his possession. Those rules are concerned with the quality, not the quantity of the evidence. The cardinal rule is designed to prevent a species of fraud which litigants are tempted to commit the withholding of, or tampering with evidence against them, by abstaining from telling the whole truth or producing the whole evidence. The subordinate rules are necessitated by the exigencies of business. They extend, it is to be remembered, not only to documentary, but to oral evidence also.\*

The rule that documents may be proved by primary evidence must be read subject to the provision in section 68 as to attesting witnesses.

Refer to sections 62—66 on the subjects of primary and secondary evidence and their admissibility.

**62. Primary evidence means the document itself**  
 Primary evi- produced for the inspection of the  
 dence. Court.

*Explanation 1.*—Where a document is executed in several parts, each part is primary evidence of the document. Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

*Explanation 2.*—Where a number of documents are all made by one uniform process, as in the case of printing, lithography, or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original,

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\* *Vide remarks in Duchess of Kingston's case, 20 State Trials.*

they are not primary evidence of the contents of the original.

*Illustration.*

A person is shown to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.

**Primary Evidence.**—In the proceedings against Queen Caroline, Abbott C. J. said : “In their judgment it is a rule of evidence as old as any part of the common law of England, that the contents of a written instrument, if it be in existence, are to be proved by the instrument itself, and not by any parol evidence.” The contents of documents must be proved either by the production of the document, which is called primary evidence, or, after satisfactorily accounting for failure to produce the original, by copies or oral accounts of the contents, which are called secondary evidence.

“Where the contents of any document are in question, either as a fact directly in issue, or a sub-alternate principal fact, the document is the proper evidence of its own contents. But where a document of any description is not a fact in issue, and is used as evidence to prove some act, independent proof *aliunde* is receivable.”—Best.

**Principle of Provisions in Documentary Evidence.**—One single principle runs through all the propositions relating to documentary evidence. It is that the very object for which writing is used to perpetuate the memory of what is written above, and so furnish permanent proof of it. In order that full effect may be given to this, two things are necessary, namely, that the document itself should, whenever it is possible, be put before the Judge for his inspection, and that if it purports to be a final settlement of a previous negotiation, as in the case of a written contract, it shall be treated as final, and shall not be varied by word of mouth. If the first of these rules were not observed, the benefit of writing would be lost. There is no use in writing a thing down unless the writing is read. If the second rule were not observed, people would never know when a question was settled, as they would be able to play fast and loose with their writings.—Stephen’s Evidence Act, 172.

**Admission of Contents.**—Under sec. 23, oral admissions of the contents of a document are irrelevant until the right to use secondary evidence is established.

**Effect of Alteration of Document after Execution.**—(a). “The rule of law applicable to this subject is that any material alteration in a written instrument, whether made by a party or a stranger, is fatal to its validity, provided it were made after its execution, and without the privity of the party to be affected by it, and perhaps, also with this additional proviso, that the alteration was made while the instrument was in the possession, or at least under the control of the party seeking to enforce it. This rule which was originally propounded with respect to deeds, probably because in former days most written engagements were drawn in that form, has since been extended to negotiable securities, bought and sold notes, guarantees and policies of assurance, and may now be said to apply equally to all written instruments, which constitute the evidence of contracts.”—Taylor, 1820.

(b). In the case of *Must. Khoob Konwar v. Babu Moodnarayan Singh*, 9 M. L. A. 17, their Lordships of the Privy Council observed :—“It may be conceded that, in an ordinary case, the party who presents an instrument, which is an essential part of his case, in an apparently altered and suspicious state, must fail, from the mere infirmity or doubtful complexion of his proof, unless he can satisfactorily explain the existing state of the document. But this wholesome rule admits of exceptions, if there be, independently of the instrument, corroborative proof strong enough to rebut the presumption which arises against an apparent and presumable falsifier of evidence. And such corroborative proof will be greatly strengthened, if there be reason to suppose that the opposite party has withheld evidence which would prove the original condition and import of the suspected document.”

(c). This was a suit on a bond, the date of which had been altered from 11th September to 25th September, while it was in the possession of the plaintiff. Fraud was not proved, and the period of limitation reckoned from the 11th September had not expired. *Held*, that the bond was void as such, and was not receivable in evidence to prove the debt—(*Christa Charlu v. Karibasya*, I. L. R. 9 Mad. 399 followed)—*Govindasami v. Kuppusami*, I. L. R. 12 Mad. 239.

(d). An immaterial alteration even by a party to the instrument does not invalidate it—*Aldons v. Cornwell*, L. R. 3 Q. B. 573.

**Document Inadmissible for want of Registration, under what Circumstances Admissible.**—(a). Where a document contains (1) a covenant, (2) a hypothecation, both being to secure the loan, it is good evidence of the loan, though inadmissible under the Registration Act to prove the hypothecation—*Kristo Lal Ghose v. Bonomali*

*Roy*, I. L. R. 5 Cal. 611. (*Luchmipat Singh Dugar v. Mirza Khairat Ali*, 4 B. L. R. (F. B.) 18, followed.)

(b). A document, which, owing to non-registration, would be inadmissible, may, if its provisions are distinct and separable, and some of those provisions contain a mere personal obligation, be used as evidence of the personal obligation, for which registration was unnecessary. Thus an unregistered bond, containing a personal undertaking to repay money borrowed, and also a hypothecation to land above Rs. 100 in value as security, may be used as evidence to enforce the personal obligation—*Alfuttinessa v. Hosain Khan Kabuli*, 12 C. L. R. 209.

### 63. Secondary evidence means and includes—

Secondary evidence. (1) Certified copies given under the provisions hereinafter contained ;

(2) Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies ;

(3) Copies made from or compared with the original ;

(4) Counterparts of documents as against the parties who did not execute them ;

(5) Oral accounts of the contents of a document given by some person who has himself seen it.

### *Illustrations.*

(a). A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

(b). A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.

(c). A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence ; but the copy not so compared is not secondary evidence of the original, although

Cases in which secondary evidence relating to documents may be given.

65. Secondary evidence may be given of the existence, condition or contents of a document in the following cases :—

(a) When the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in section sixty-six, such person does not produce it ;

(b) When the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest ;

(c) When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time ;

(d) When the original is of such a nature as not to be easily moveable ;

(e) When the original is a public document within the meaning of section seventy-four ;

(f) When the original is a document of which a certified copy is permitted by this Act, or by any other law in force in British India, to be given in evidence ;

(g) When the originals consist of numerous accounts or other documents which cannot conve-



niently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (*a*), (*c*) and (*d*), any secondary evidence of the contents of the document is admissible. In case (*b*), the written admission is admissible. In case (*e*) or (*f*), a certified copy of the document, but no other kind of secondary evidence, is admissible. In case (*g*), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

**Purport of the Section.**—Before the passing of the Evidence Act, there was no section in any Act relating to evidence defining clearly the cases in which secondary evidence of a document could be given, but it was known law that amongst the grounds which authorized the admission of secondary evidence was the loss or destruction of the original. This Act defines the cases in which secondary evidence is admissible. In section 64 the general rule of law is laid down, that documents must be proved by primary evidence except in the cases mentioned in sec. 65. Section 65 gives the various cases in which secondary evidence may be given. The *first* is when the document is in the possession or power of the opposite party, or of any person out of the reach of, or not subject to the process of, the Court, or of any person legally bound to produce it, but who fails to produce it when required. The *second*, when the contents are admitted by the opposite party in writing. The *third*, when the original is lost or destroyed. The *fourth*, when the original is not easily moveable. The *fifth*, when the original is a public document. The *sixth*, when the document is one of which a certified copy can be used. And the *seventh*, when the originals consist of numerous documents or accounts, the general result of which is the fact to be proved. Another branch of the law of Evidence is contained in sec. 91 and the following sections. It deals with the question, how far oral evidence or evidence of oral communications may be given to vary, control or add to the effect of a document.

This section is applicable to both Civil and Criminal cases.

**Nature of Secondary Evidence under the Several Clauses.**—In cases under clauses (*a*), (*c*) and (*d*), any secondary evidence is

admissible. The words "in cases (a), (c) and (d), any secondary evidence is admissible" are too clear and too strong to be controlled by anything that follows—*In the matter of a collision between the Ava and the Brenhelda*, I. L. R. 5 Cal. 568.

Under clauses (e) and (f), secondary evidence is admissible even though the original is in existence; but in these cases certified copy of the document and no other kind of secondary evidence is admissible. There are, it seems, no recognized degrees of secondary evidence concerning the contents of a private document. A party entitled to resort to this mode of proof may use any form of it; his not adducing, or even wilfully withholding some other, likely to be more satisfactory, is only a matter affecting the weight and value of such evidence. A private copy is as admissible as an official one; parol evidence is as admissible as either.

**Necessity of accounting for Non-production of Original Document.**—By the law of evidence administered in England, which has been, in a great measure, with respect to deeds, made the law of India, the first condition of the right to give secondary evidence of the contents of a document not produced in Court, is the accounting for the non-production of the original; therefore, when no attempt is made to obtain the original from the proper person, or even to inquire whether or not it is in the custody of the person, in whose custody it is supposed to be, in short, when no search for it or inquiry respecting it is made, secondary evidence will not be admitted.\* Whether or not sufficient proof of search for, or loss of, an original document, to lay a ground for the admission of secondary evidence, has been given, is a point proper to be decided by the Judge of first instance, and is treated as depending very much on his discretion. His conclusion should not be overruled, except in a clear case of miscarriage.† Until a party has exhausted all the means prescribed by law for compelling the person to produce a document known to be with him, and so long as the original is procurable or its loss not satisfactorily accounted for, secondary evidence cannot be admitted.‡

Whether a sufficient foundation has been laid for admitting secondary evidence is often a matter of nicety, and depends on whether sufficient proof has been given of the destruction or loss of the document; whether a notice to produce is required,—as in many cases the proceedings amount to constructive notice, and in others notice to produce is dispensed with by statute,—and if so, whether the notice given is sufficient in its terms, and has been given in proper time, &c.

\* *Vide Bhubaneswari Debi v. Hari Saran Sarma Moitra*, I. L. R. 6 Cal. 720.

† *Vide Haripria Debi v. Rukmini Debi*, I. L. R. 19 Cal. (P. C.) 498.

‡ *Vide Gtish Chunder Lahiri v. Ram Lal Sarcar*, 1 W. R. 145.

**Objections to Admission of Secondary Evidence.**—A defendant who does not object to the admission of secondary evidence at the time it is admitted cannot be allowed to object to it in special appeal—*Lochan Singh v. Het Narain Singh*, 24 W. R. 232. *Vide* also *Chinnaji Govind Godbole v. Dinkar Dhondev Godbole*, I. L. R. 11 Bom. 320; (2) *Akbar Ali v. Bhyea Lal Jha*, I. L. R. 6 Cal. 666; (3) *Gour Surun Dass v. Kankya Singh*, 2 W. R. 237; (4) *Kasinath Mukerji v. Mohesh Chundra Gupta*, 26 W. R. 168.

**OL. (a).**—*Vide* notes to sec. 66.

(a). Documents which a witness is not bound to produce are mentioned in sections 130 and 131 *post*. A witness may also refuse to produce a document on which he has a lien.

(b). Secondary evidence tendered to prove the contents of an instrument which is retained by the opposite party after notice to produce it can only be admitted in the absence of evidence to show that it was unstamped when last seen—*The Marine Investment Co. v. Haviside*, L. R. P. C. 624. *Vide* also *Seanandan v. Kollakiran*, I. L. R. 2 Mad. 208.

(c). In a suit by the purchaser of a debt, the plaintiff stated that, in 1873, A executed a bond in favour of B to secure the repayment of Rs. 1,000, and that he had purchased the interest of B at a sale in execution of a decree against him. The plaintiff now sued A upon the bond, making B a party. At the trial A denied the execution of the bond, and it was not produced by the plaintiff who, having served B with notice to produce, tendered secondary evidence of its contents. B was not examined as a witness, and no evidence was given of the loss or destruction of the bond. *Held* by Pontifex and Morris JJ., (Prinsep J. dissenting), that secondary evidence was not admissible—*Woomesh Chunder Ghose v. Shama Sundari Bai*, I. L. R. 7 Cal. 98.

**OL. (b).**—(a). Notwithstanding the provision in sec. 22, a written admission is admissible as proof of a document, even though the original is in existence and might be but is not produced.

(b). The defendant in an ejectment suit claimed to be in possession under a mortgage-deed for Rs. 1,000, executed in 1865 but not registered, and a second mortgage-deed of Rs. 50 of the same date, in which the first mortgage was recited. *Held*, that by virtue of sec. 13 of the Registration Act, 1864, the first mortgage-deed could not be put in evidence, and that the defendant could not give secondary evidence thereof under sec. 65 (b) of the Act—*Divethi Varada Annyangar v. Krishnasami Ayyangar*, I. L. R. 6 Mad. 117.

**Insufficiently Stamped Documents.**—A suit was brought on an unstamped promissory note. The defendant admitted, by his written statement, execution of the note and receipt of the consideration-money, but pleaded that he had paid off the debt. The High Court held that the case was one in which no secondary evidence under this clause was admissible, the primary evidence, the document itself being forthcoming and inadmissible—*Damodar Jagannath v. Atmaram Babaji*, I. L. R. 12 Bom. 443. This decision followed (1) *Aktur Chunder Roy v. Madhab Chunder Ghose*, 21 W. R. 1; (2) *Sheikh Akbar v. Sheikh Khan*, I. L. R. 7 Cal. 256; (3) *Radha Kant Saha v. Abhoy Charn Mitter*, I. L. R. 8 Cal. 721; and distinguished (1) *Golap Chand v. Thakurani Mohokoom Kooari*, I. L. R. 3 Cal. 314 and (2) *Hiralol Datadin*, I. L. R. 4 All. 135. See also *Pothereddi v. Velayudasivan*, I. L. R. 10 Mad. 94. But see (1) *Balbhadar Prasad v. The Maharajah of Bstia*, I. L. R. 9 All. (F. B.) 351; (2) *Binjaram v. Rajnohon Roy*, I. L. R. 8 Cal. 282; (3) *Krishnasami Pillai v. Rangasami Chetti*, I. L. R. 7 Mad. 112.

**Ol. (c).—Loss of the Original.**—(a). What degree of diligence is necessary in the search cannot easily be defined, as each case must depend much on its own peculiar circumstances; but the party is generally expected to show, that he has, in good faith, exhausted in a reasonable degree all the sources of information and means of discovery, which the nature of the case would naturally suggest and which were accessible to him.—Taylor, sec. 429. *Vide Syud Abbas Alikhan v. Yadeem Rami Reddi*, 3 M. L. A. 156.

(b). Secondary evidence of the contents of a document requiring execution, which can be shown to have been last in proper custody, and to have been lost, and which is more than thirty years old, may be admitted under cl. (c) and section 90 of the Code, without proof of the execution of the original—*Khetter Chunder Mukerji v. Khettrapal Shritirutno*, I. L. R. 5 Cal. 886.

(c). Probable evidence of the destruction of a written document is sufficient to let in secondary evidence of its contents. *Vide* case of Justice Johnson, 29 S. T. 437.

(d). Where an original document is not said to have been lost or destroyed, the proper foundation is not laid for the admission of secondary evidence; if the party interested in its production appears after diligent efforts, to have had difficulty in producing it, the Court ought to give him more time—*Wuzeer Ali v. Kallee Coomar Chuckerbutty*, 11 W. R. 228. See Goodeve on Evidence, 342.

(e). Secondary evidence of a document should not be admitted unless the absence of the original is sufficiently accounted for—

*Rakkhal Das Bundopadhya v. Indramoni Debi*, 1 C. L. R. 155. See also 1, *Srimutty Gourmoni v. Huri Kishore Roy*, 10 W. R. 338 ; 2, *Sukram Sookul v. Ram Lal Sukul*, 9 W. R. 248.

(f). A copy of a deed which has been proved to be lost should not be received in evidence, and is of no value as evidence even when admitted, unless it has first been proved that the copy produced is a correct copy of the lost deed—*Lukhimoni Dasi v. Koruna Kant Moitro*, 3 C. L. R. 509. Vide also *Ram Prausad v. Raghunandan Persaud*, I. L. R. 7 All. 738.

(g). Secondary evidence of the contents of a document cannot be admitted without the non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in this section—*Krishna Kissors Chowdhrahi v. Kissors Lal Roy*, I. L. R. 14 Cal. (P. C.) 486.

(h). Where a Court is satisfied that a deed was executed and has been lost or destroyed, it should receive secondary evidence of the contents, documentary or oral ; and it is not necessary that the witnesses called in to give oral testimony should be attesting witnesses—*Syud Lotfoollah v. Musst. Nusseehun*, 10 W. R. 24.

(i). Where a copy of a deed is tendered as evidence and the party tendering it fails to comply with the conditions required to make the copy statutory proof of the deed, he is at liberty to give other secondary evidence of the contents of the deed, if the non-production of the original has been duly accounted for—*Musst. Amserunnissa Khatoon v. Musst. Abdoonnissa Khatoon*, 23 W. R. 208.

(j). A copy of a document filed in another suit among the records of the Court, and still there was endorsed "copy in accordance with the original" signed by the Judge who presided in the Court who also was authorized to compare and accept such copy ; held, that there were grounds for considering it genuine—*Luchman Singh v. Poona*, I. L. R. 16 Cal. (P. C.) 753.

**Default of Party offering Secondary Evidence.**—(a). Secondary evidence is admissible in case of a document being allowed to remain unregistered through no fault of the party offering it—*Nynakka Routhen v. Varana Mahomed Naina Routhen*, 5 M. H. C. R. 123.

(b). It is not enough for a party desirous of adducing secondary evidence of the contents of a document which ought to have been registered, to show that he cannot produce it because it is not registered : he must show that its non-registration was not due to any fault or want of diligence on his part, or he must shew that the party against whom he desires to use it was guilty of such fraud

in the matter of non-registration that he cannot be allowed to object on that ground to the production of the secondary evidence—*Kumessooddeen Hoidar v. Rojjeeb Ali Saha*, 9 W. R. 528.

**Ol. (d).**—Examples of case (d) are characters traced on a rock, or engraven on a tombstone or chalked on a wall or building, or contained in a paper permanently fixed to it; surveyors' marks on boundary trees and inscriptions on monuments.

**Ols. (e) and (f).**—As the documents mentioned in these clauses are little liable to corruption, alteration or misrepresentation and as the production of the same documents in different places at the same time is highly inconvenient and likely to cause their destruction from frequent use, the law deems it better to allow their contents to be proved by secondary evidence.

*Vide* secs. 76-78 *post*.

**Ol. (f).**—This clause applies to the case in which the public document is still in existence on the public records, and is a provision intended rather to protect the originals of public records from the danger to which they would be exposed by constant production in evidence, than to interfere with the general rule of evidence given in cl. c that secondary evidence may be given when the original has been destroyed or lost. In the case of *Kunneth Odangat Kalandan v. Vayoth Palliyal Kunhunni*, 1. L. R. 6 Mad. 80, the original of a plaint having been destroyed, the Court admitted secondary evidence of the document by a production of an uncertified copy.

**To be given in Evidence.**—This expression means to be given in evidence in the first instance without having been introduced by other evidence—*Harish Chunder Mullick v. Prossono Cumar Banerjee*, 22 W. R. 303.

**Ol. (g). Result.**—The word result must be construed strictly to mean the actual figures or facts arrived at, not the general effect on the person's mind. "This exception will not enable a witness to state the general contents of a number of letters received by him from one of the parties in the cause, though such letters have since been destroyed, if the object of the examination be to elicit from the witness the impression which they produced on his mind, with reference to the degree of friendship subsisting between the writer and a third party."—Taylor, sec. 463.

See sec. 394 of the Code of Civil Procedure.

When secondary evidence in action of libel is allowed, it is necessary that the actual words used, as laid in the declaration, must be proved and not the substance, or the impression which the witnesses

received, of the words as otherwise the witnesses and not the Court or jury, would be made the Judges of what is a libel—*Reiny v. Bravo*, L. R. 4 (P. C.) 287.

**Acknowledgment as prescribed in Sec. 19 of the Limitation Act.**—(a). An original account-book containing an acknowledgment of a debt had been filed in Court. *Held*, that secondary evidence of such acknowledgment might be given notwithstanding the words of sec. 19 of the Limitation Act—*Wajibun v. Kadir Buksh*, I. L. R. 13 Cal. 292.

(b). Limitation Act, sec. 19, must be read with secs. 65 and 91 of the Code, and does not exclude secondary evidence in cases where such would be admissible under sec. 65—*Chathu v. Virayan*, I. L. R. 15 Mad. 491. Mr. Field holds an opposite view. He says : “There is one case in which oral evidence cannot be admitted of a writing destroyed or lost, and which therefore forms an exception to the general rule contained in this clause, *viz.*, when the writing is an acknowledgment which would have the effect of extending the period of limitation under sec. 19 of the Indian Limitation Act, XV of 1877.”—*Evi.*, 386. The wording of sec. 19 of Act XV seems to support the view taken by Mr. Field. The second paragraph of the section runs thus : “When the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed ; but oral evidence of its contents shall not be received.”

**Non-registration.**—Plaintiff alleged that A and B had sold and conveyed by an unregistered deed certain land to the person under whom he claimed. The deed being inadmissible in evidence, B was called to prove the sale. *Held*, that B's evidence should have been rejected, as secondary evidence of the unregistered deed could not be received—*Ram Chunder Halder v. Govind Chunder Sen*, 1 C. L. R. 542. *Vide also*—

- (1). *Kabulan v. Shamsir Ali*, 11 W. R. 16.
- (2). *Dinanath Mukerji v. Debnath Mullick*, 13 W. R. 307.
- (3). *Mr. L. G. Crowdie v. Kuller Chowdhury*, 21 W. R. 307.
- (4). *Varada v. Krishna Sami*, I. L. R. 6 Mad. 117.

**Banker's Books.**—Secondary evidence of the contents of documents may be given if the documents are banker's books. See Act XVIII of 1891.

**Miscellaneous.**—(a). Where a document is named by the plaintiff as the best evidence in his favour, he ought not, in its absence, to be allowed to give any other evidence until that document is accounted for—*Asman Singh v. Doorga Roy*, 21 W. R. 262.

(b). Where an important document, i.e., a letter is not produced, and no explanation is given of its non-production, an inference not unnaturally arises either that the letter, if written, does not contain that which it is represented to contain or that no such letter ever existed—*Dinomoyi Debi Chowdhurani v. Luchmiput Singh Bahadoor*, 6 C. L. R. 101.

(c). A Board of Trade Certificate of which a duplicate is kept by the Registrar-General of seamen was lost, and evidence was tendered that it was a master's certificate of a particular number and issued at Liverpool, it was held that the case was met by clauses (a), (c) and (f) and as any kind of secondary evidence could be given under clauses (a) and (c), the evidence tendered was admissible—*In the matter of the collision between the 'Ava' and the 'Brenhelda'*, I. L. R. 5 Cal. 568.

(d). An examined copy of a quinquennial register is evidence without the production of the original—*Srimatty Oodoy Moni Debi v. Bishonath Dutt*, 7 W. R. 14.

(e). A lotbundi cannot be accepted as secondary evidence in lieu of the certificate of sale, unless the absence of the certificate is sufficiently accounted for and no better evidence than the lotbundi can be produced—*Musst. Ustoorun v. Babu Mohun Lal*, 21 W. R. 333.

(f). Where a question arises (not between mortgagor and mortgagee) as to previous existence or non-existence of a particular mortgage, the oral evidence of the mortgage that it did exist will be sufficient to prove the fact, without the production of the mortgage-deed—*Amjad Ali v. Moniram Khalipa*, I. L. R. 12 Cal. 52.

(g). In a suit to recover possession of certain immoveable property purchased at a sale in execution of a decree, the proceedings confirming the sale might be received in evidence in the absence of the sale certificate to prove the plaintiff's title—*Tara Prosad Myte v. Nund Kissore Giri*, 12 C. L. R. 448. See also *Durga Naryan Sen v. Beni Madhob Mazumdar*, I. L. R. 8 Cal. 199.

66. Secondary evidence of the contents of the documents referred to in section sixty-five, clause (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document

Rules as to  
notice to produce.



is, or to his attorney or pleader, such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case: Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it:—

(1) When the document to be proved is itself a notice;

(2) When, from the nature of the case, the adverse party must know that he will be required to produce it;

(3) When it appears or is proved that the adverse party has obtained possession of the original by fraud or force;

(4) When the adverse party or his agent has the original in Court;

(5) When the adverse party or his agent has admitted the loss of the document;

(6) When the person in possession of the document is out of reach of, or not subject to, the process of the Court.

**Procedure in Civil Cases.**—Secs. 70, 131, 134, 163 and 164 of the Code of Civil Procedure (Act XIV of 1882) lay down the procedure to be followed by the party who applies for the production or inspection of documents. Sec. 60 enjoins that where any documents are not in the possession of the plaintiff, he must, if possible, state in whose possession or power they are. Sec. 79 lays down that the defendant shall be required in the summons to produce any document in his power or possession, upon which he intends to rely in support of his case or by which he intends to meet the plaintiff's case.

**Procedure in Criminal Cases.**—Secs. 94 to 98 of the Code of Criminal Procedure (Act X of 1882) lay down the procedure which it would be best to follow for the production of documents in criminal cases; but it seems that any reasonable notice would be sufficient to let in secondary evidence.

*Vide notes to sec. 65 ante.*

**Notice to Produce.**—It is difficult to lay down any general rule as to what the notice ought to contain, but it seems that it would suffice if enough is stated in the notice to induce the party to believe that a particular instrument will be called for.—Taylor, sec. 413. But a mere notice to produce “all letters and books relating to the cause” has been held by the English Courts to be too vague. The summons should describe the required documents with all convenient certainty.

**Object of Notice.**—The object of notice to produce is to enable the party to have the document in Court to produce it if he likes; and if he does not, then to enable the opponent to give secondary evidence, and thus exclude the argument that the opponent has not taken all reasonable means to procure the original which he must do before he can be permitted to make use of secondary evidence.\*

“It would seem that where a party has notice to produce a particular instrument traced to his possession, he cannot object to secondary evidence of its contents, on the ground that previous to the notice he had ceased to have any control over it, unless he has stated this fact to the opposite party, and has pointed out to him the person to whom he delivered it; neither can he escape the effect of the notice, by afterwards voluntarily parting with the instrument, which it directs him to produce.”—Taylor, sec. 440.

**Sufficient Notice.**—(a). Where a party to a suit, or his attorney, has a document with him in Court, he may be called on to produce it without previous notice; and in the event of his refusing, the opposite party may give secondary evidence.

(b). Where a defendant, out of the jurisdiction of the Court, was summoned to produce a letter and did not comply with the summons, but appeared by pleader at the last moment at the hearing of the suit and service of notice on the pleader to produce the letter would have been nugatory, secondary evidence of the contents of the letter was admitted under proviso (6) of the section—*Bishop Mellus v. The Vicar Apostolic of Malabar*, I. L. R. 2 Mad. 295.

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\* *Vide Dwyer v. Collins*, 7 Exch., 689.

**CL. 6.—(a).** Where a commission to take evidence is issued to a place beyond the jurisdiction of the Court issuing the commission, it is not necessary for the party, tendering secondary evidence of the contents of a document, to show that he has given notice to produce the original, or that there has been a refusal to produce the original—*Ralli v. Gan Kim Swee*, I. L. R. 9 Cal. 939.

**Dispensing with Notice.**—The power given to the Court to dispense with the notice in any case in which it thinks fit is a relaxation of the procedure in force in the English Law Courts.

**67.** If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

Proof of signature and handwriting of person alleged to have signed or written document produced.

**Object and Scope of the Section.**—This section does not render it necessary that direct evidence of the handwriting of the person who is alleged to have executed the deed must be given by some person who saw the signature affixed. It merely states with reference to deeds what is the universal rule in all cases, that the person who makes an allegation must prove it. It lays down no new rule whatever as to the kind of proof which must be given. It leaves it, as before, entirely to the discretion of the presiding judge of fact to determine what satisfies him that the document is a genuine one. *Vide* remarks of Markby J., in *Neel Kanto Pandit v. Juggobundhoo Ghose*, 12 B. L. R. App. 18.

**Signature.**—The Act does not define signature.

Sec. 2, Act XIV of 1882 (The Code of Civil Procedure) thus defines the word signed: "Signed includes marked, when the person making the mark is unable to write his name; it also includes stamped with the name of the person referred to." *Vide* also sec. 3, Act III of 1877 (The Registration Act), and also sec. 50, Act X of 1865 (The Indian Succession Act).

**Method of Proof.**—*Vide* secs. 45 and 47 *ante* and 73 *post*.

(a). The act does not require the writer of a document to be examined as a witness, nor does this section require the subscribing witnesses to a document to be produced—*Abdool Ali v. Abdoor Rahaman*, 21 W. R. 429.

(b). The proof required by this section may be any of the recognized modes of proof and amongst others by statements admissible under sec. 32.

(c). A deed of conveyance was tendered in evidence which purported to bear the signature of G as vendor, and which was duly attested by four witnesses. G, however, denied that she had ever executed the deed, and said that the mark was not her's. All the attesting witnesses were dead. A witness was called who knew the handwriting of one of the attesting witnesses, and who swore that the signature of that witness to the attestation clause of the deed was genuine. *Held*, on the authority of *Whitelock v. Musgrave*, 2 Cr. and M. 511, that the deed was admissible in evidence, its execution by G being sufficiently proved—*Abdulla Paru v. Gunnibai*, I. L. R. 11 Bom. 690.

68. If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.

Proof of execution of document required by law to be attested.

**Rule of Law.—(A). English Law.**—The rule contained in this section is probably the most ancient and the most inflexible of all the rules of evidence. Lord Ellenborough, in *R. v. Harringworth*, observed : “The rule, therefore, is universal that you must first call the subscribing witness ; and it is not to be varied in each particular case by trying whether in its application it may not be productive of some inconvenience, for then there would be no such thing as a general rule. A lawyer who is well stored with these rules would be no better than any other man that is without them, if by mere force of speculative reasoning it might be shown that the application of such and such a rule would be productive of such and such an inconvenience, and therefore ought not to prevail ; but if any general rule ought to prevail, this is certainly one that is as fixed, formal and universal as any that can be stated in a Court of justice.” The English law is so inexorable that the rule applies even to a cancelled or burnt deed ; as also to one the execution of which is admitted by the party to it ; and that too, though such admission be deliberately made either in open Court, or in a subsequent agreement, or even in a sworn answer to a bill of discovery filed against the person in the cause. So, also, the attesting witness must be examined, though, subsequently to the execution of the deed, he has become blind ; and

the Court will not dispense with his examination on account of illness, however severe. *Vide* Taylor, secs. 1641, 1883.

**(B). Indian Law.**—The Indian law, as laid down in this section and the three subsequent sections, has relaxed the English law as laid down above, to a reasonable extent, as experience has shown that strict application of the rule is detrimental to justice. Secs. 68, 69, 70 and 71 apply only to documents required by law to be attested, and contain the following salutary provisions in regard to the proof of execution of such documents :—

*1st.*—One attesting witness at least should be called for the purpose of proving the execution of such documents, if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence.

*2nd.*—Where there is no attesting witness alive and subject to the process of the Court and capable of giving evidence, the handwriting of the attestation of one attesting witness at least and of the signature of the person executing the document must be proved by other evidence.

*3rd.*—The admission of a party to the document of its execution dispenses with the above requirements.

*4th.*—If the attesting witness denies or does not recollect the execution, other evidence of the execution may be given.

**Documents required by Law to be attested.**—Documents required by the law of this country to be attested, in order to be admissible in evidence, are the following :—

*1st.*—Wills made by persons other than Hindus, Muhamedans, or Buddhists, after January 1866. *Vide* secs. 50 and 331 of Act X of 1865.

*2nd.*—Wills made by Hindus, Jainas, Sikhs, and Buddhists on or after the 1st day of September 1870, in the territories mentioned in Act XXI of 1870.

*3rd.*—A mortgage, the principal money secured by which is one hundred rupees or upwards. *Vide* sec. 59 of Act IV of 1882.

*4th.*—A gift of immoveable property. *Vide* sec. 123, Act IV of 1882.

Cunningham J., in his Evidence Act, says : “The Transfer of Property Act, 1882, also requires attestation in the case of all mortgages, leases, gifts, and other transfers of immoveable property, in which a document is required.” This opinion does not seem to us to be quite correct. The Act provides that a mortgage, the

principal money secured by which is Rs. 100 or upwards, can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses. A similar provision is made as regards gifts of immoveable property ; but no such provision as to attestation by witnesses as regards leases and other transfers of immoveable property is to be found in the Transfer of Property Act. *Vide* secs. 54 and 107 of Act IV of 1882.

**Exceptions to the Rule.**—(a). Sec. 90 *post* provides for the presumption of the authenticity of the signatures to a document 30 years old and consequently modifies the requirements of this section.

(b). According to English law, when a document is in the possession of the adverse party, who refuses to produce it after notice, the attesting witness need not be called to prove the execution of such a document. It seems to us that the requirements of this section may be dispensed with in the case of documents, the contents of which may be proved by secondary evidence under the provisions contained in secs. 65 and 66 *ante*.

(c). This section does not affect the Merchants Shipping Act, 17 and 18 Vic., c. 104.

69. If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

Proof where no  
attesting witness  
found.

**Signature.**—No definition of the word 'signature' is given in the Act, but the context sufficiently implies that the attestation of the attesting witness must be in his own handwriting, and that the signature of the person executing the document must be in the handwriting of that person ; consequently the word signature cannot include and apply to the affixing of a mark. No witness can, with any degree of certainty, identify the marks made by another person. It is therefore not reasonable to suppose that when the witnesses and the executants of an instrument are mere marksmen, and when none of them can be found to depose to the execution of such an instrument, the bare statement of a third party to the effect that he can identify the marks on the instrument as marks made by its

executants and witnesses should be considered as sufficient proof of the fact of its execution. No doubt the definition of signature contained in sec. 3 of the Registration Act, III of 1877, includes and applies to the affixing of a mark and the word signed in sec. 2 of the Civil Procedure Code has been defined to include 'marked' when the person making the mark is unable to write his name; but a reference to cl. 3, section 50 of the Indian Succession Act, X of 1865, and to the cases decided under it, shows that the word 'sign' in that clause does not include a mark-signature. (*Vide Nitye Gopal v. Nagendra Nath Mittra*, I. L. R. 11 Cal. 429, and *Fernandes v. Alves*, I. L. R. 3 Bom. 382).

70. The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

Admission of execution by party to attested document.

Under the present section, the party's admission is sufficient proof of the execution of a document as against himself. The English rule on the subject is precisely the opposite. *Vide Best*, 529.

Section 22 *ante* excludes oral admission of the contents of a document, this section allows oral admission of the execution of a document. The two sections are not conflicting.

71. If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

Proof when attesting witness denies the execution.

*Vide notes to the previous sections.*

72. An attested document not required by law to be attested may be proved as if it was unattested.

Proof of document not required by law to be attested.

*Vide notes to sec. 68 ante.*

Where the witnesses to a deed of sale are alive, their testimony is not the only evidence by which it can be established. It may be established by any other evidence—*Daitari Mahanti v. Juggobundhu Mahanti*, 23 W. R. 293.

73. In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

**The English Law.**—The English law, as it existed before 1854, did not allow the witness or even the jury, except under certain special circumstances, actually to compare two writings with each other to ascertain whether both were written by the same person. The Common Law Procedure Act, 1854, 17 and 18 Vic., c. 125, introduced as a remedy a middle course in civil cases. Sec. 27 enacted that, "Comparison of a disputed writing with any writing proved to, the satisfaction of the Judge to be genuine shall be permitted to be made by witnesses, and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness, or otherwise, of the writing in dispute." By sec. 103, this enactment applied to every Court of Civil Jurisdiction; and the 28 Vic., c. 18, secs. 1 and 8 extended its provisions to criminal cases.

**Different modes of proving Handwriting.**—A man's signature and handwriting may be proved: 1st—By direct evidence of the signature or of the writing; 2nd—By an expert who can compare handwritings (*vide* sec. 45 *ante*); 3rd—By a witness who is acquainted with the handwriting of the person who is supposed to be writer of the document in question (*vide* sec. 47 *ante*); and 4th—By a comparison made by the Court.

**Unsatisfactory Character of the Evidence of Comparison of Handwriting.**—Evidence of comparison of handwriting is often



extremely dangerous. "Many persons write alike, having the same teacher, writing in the same office, being of the same family,—all these produce similitude in handwriting, which, in common cases and by common observers, is not liable to be distinguished. The handwriting of the same person varies at different periods of life : it is affected by age, by infirmity, by habit."\* It is to be remembered that men of business acquire a mechanical style of writing which obliterates all natural characteristics, unless the instances where the character is so strongly individual as not to be modified into the general mass. Men are also taught to write after one model, and we often find that the style of handwriting is *hereditary*. Standing alone such evidence is worth little, in a criminal case almost nothing—its real value being as *adminiculum* of testimony, but it may become, slight evidence though it is, cogent proof, if it is allowed to go uncontradicted.

(a). A comparison of signatures is a mode of ascertaining the truth which ought to be used with very great care and caution—*Srimaty Phodi Bibi v. Govind Chunder Roy*, 22 W. R. 272.

(b). It may be generally said that no two real signatures of any person accustomed to write freely ever correspond exactly, there is always some degree of diversity between them. And in making the comparison between two real signatures, the opinion of people would differ as the amount of apparent diversity. The judgment may well enough be led astray as to the erroneous opinion that the diversity which is apparent, is inconsistent with the identity of the two signatures. *Vide* the observations of Phear J., in *Lallah Jha v. Musst. Bibi Tullebmatool Tuhra*, 21 W. R. 436.

(c). Finding of forgery on comparison of handwriting only was disapproved of in *Kurali Persad Misra v. Anantram Hajra*, 16 W. R. (P. C.) 16.

(d). The fact that a memorandum bore a similarity to the proved handwriting of the accused was held not to be sufficient evidence to prove that the memorandum was in the handwriting of the accused—*Nobin Krishna Mukerji v. Rasik Lal Laha*, I. L. R. 10 Cal. 1047.

**Proved to the satisfaction of the Court.**—Where certain ryots swore that they got their pottahs from the hands of the person who professed to sign them, this was held under this section as 'proving to the satisfaction of the Court' that the signatures were those of the lessor—*Tara Persaud Tangee v. Luckee Naryan Paurai*, 21 W. R. 8.

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\* *Vide R. v. Mr. Justice Johnson*, 29 How. St. Tr., 475.

*Public Documents.*

Public documents.

74. The following documents are public documents :—

1. Documents forming the acts, or records of the acts—

- (i) Of the sovereign authority ;
- (ii) Of official bodies and tribunals ; and
- (iii) Of public officers, legislative, judicial and executive, whether of British India, or of any other part of Her Majesty's dominions, or of a foreign country.

2. Public records kept in British India of private documents.

**Definition of Public Documents.**—Public documents have been defined as the “acts of public functionaries, in the Executive, Legislative and Judicial Departments of Government, including, under this general head, the transactions which official persons are required to enter in books or registers, in the course of their public duties, and which occur within the circle of their own personal knowledge and observation.”—1 Greenl. Ev., sec. 470.

**Public Documents.**—(a). **Jummabundi.**—A jumma bundi prepared by a Deputy Collector, while engaged in the settlement of land under Reg. VII of 1822, is a public document within the meaning of this section—*Taru Patur v. Abinash Chunder Dutt*, I. L. R. 4 Cal. 79. This case was doubted by their Lordships in the case of *Ram Chundra Sao v. Bunsseedhar Naik*, I. L. R. 9 Cal. 741. Garth C. J. remarked : “I think it would be extremely dangerous to admit evidence of this kind under the guise of public documents. Such papers are merely prepared by the Government as landlords for the purposes of their estate, and they appear to me to be no more evidence against the tenants of that estate than similar documents would be, prepared by other landlord.” Their Lordships, who decided the case of *Akshya Kumar Dutt v. Shama Charan Patitanda*, I. L. R. 16 Cal. 586, also shared in these doubts.

(b). **Letters.**—Letters between district authorities are public documents forming a record of the acts of public authorities, and as

such, admissible as evidence under this section—*Prithee Singh v. The Court of Wards*, 23 W. R. 272.

(c). **Plaint.**—A certified copy of a plaint was admitted in evidence on the ground that the plaint was a public document as it formed a part of a record—*Mahomed Sahabuddin v. Wedgeberry*, 10 B. L. R. App. 31. Mr. Field J. thought that this decision was manifestly wrong, and we are disposed to agree with him.

(d). **Registers of Chakran Lands.**—The Registers of chakran lands are public records supposed to contain a correct list of the chakran lands in existence at the time of the Decennial Settlement—*The Collector of East Burdwan v. Sheikh Imdad Ali*, W. R. (1864) 358.

(e). **Records of Compromise, &c.**—Where a suit is compromised, a petition is presented in the usual way, and the Court makes an order confirming the agreement, which, with the order, as well as the agreement and power of attorney, are all entered upon the record, these papers become as much a part of the record in the suit as if the case had been tried and judgment given between the parties in the ordinary way; and that record is a public document—*Bhagain Megh Rani Koer v. Gooroo Prosaud Singh*, 25 W. R. 68.

Private documents. 75. All other documents are private.

**Private Documents.**—(a). **Annumatipatra.**—An *annumatipatra* or instrument giving permission to adopt is not a public document within the meaning of this section—*Krishna Kishori Chowdhurain v. Kessori Lal Rai*, I. L. R. 14 Cal. 486.

(b). **Board of Trade Certificate.**—A certificate granted by the Board of Trade is not a public document within the meaning of this section—*In the matter of a collision between the 'Ava' and 'Brenhilda'*, I. L. R. 5 Cal. 568.

(c). **Confession, Record of.**—The record of a confession of an accused person recorded by the Magistrate of Bhind, in Gwalior, probably is a public document.—*Queen-Empress v. Sundar Singh*, I. L. R. 12 All. 595.

(d). **Government Measurement Chitta.**—1. In a suit to obtain possession, under a title acquired by purchase at an auction of certain lands, together with mesne profits, upon setting aside an alleged taluq's etmami right claimed by the defendants, in support of their claim, produced certain documents purporting to be abstracts from or copies of Government measurement chittas, dated Mughl 1126-27 (1764). These documents were produced from the Collectorate, but

there was nothing to show that they were the records of measurements made by any Government officer. *Held*, that they were not public documents within the meaning of this section—*Nityanund Roy v. Abdur Raheem*, I. L. R. 7 Cal. 76.

2. Chittas made by Government for its own private use are nothing more than documents prepared for the information of the Collector, and are not evidence against private persons for the purpose of proving that the lands described therein are or are not of a particular character or tenure—*Ram Chundra Sao v. Bungsidhar Naik*, I. L. R. 9 Cal. 741.

3. The measurement papers, prepared by a Butwara Ameen deputed by the Collector to make a partition, do not come within sec. 35 of the Act, and is not a public document—*Mohi Chowdhry v. Dhiro Missrain*, 6 C. L. R. 139.

(e). **Teiskhana Register.**—A Teiskhana Register prepared by a patwari under rules framed by the Board of Revenue under sec. 16 of Regulation XII of 1817 is not a public document within the meaning of this section—*Bajinath Singh v. Sukhu Maton*, I. L. R. 18 Cal. 534.

(f). **Miscellaneous.**—Plaints, written statements, affidavits, returns, petitions filed in Courts and before public officers and endorsed by them as filed, do not belong to the class of public documents. But as regards the entries showing that they were filed and the orders endorsed thereon, they are public documents, and such entries and orders may be proved by certified copies.

76. Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal; and such copies so certified shall be called certified copies.

Certified copies  
of public documents.

**Explanation.**—Any officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

**Scope of the Section.**—This section in its application is limited to that class of documents which any person has a right to inspect. The requirements of this section should be strictly complied with. The certificate of the copy being a true copy, should be signed, dated by the proper officer and sealed.

**Right to Inspect.**—Mr. Taylor says : “It may be laid down with tolerable safety, as a rule applicable alike to the general records of the realm and to all other writings of a public nature, that if the disclosure of their contents would, in the opinion of the Court, or of the Chief Executive Magistrate, or of the head of the department under whose control they may be kept, be injurious to the public interests, an inspection would not be granted.”—Evi., 6th Ed., sec. 1336.

The principal documents which the public have a right to inspect are—

1st.—Registers kept in Registration Offices under the Registration Act, III of 1877.

2nd.—Register of Members of Joint Stock Company, Act VI of 1882, and documents kept by the Register of Joint Stock Companies.

3rd.—Books kept by the Administrator-General showing the accounts of each estate, receipts, disbursements, debts, &c.—Act II of 1874.

4th.—Marriage Registers under Act XV of 1872 (Christian Marriage Act).

5th.—Register of Copyright, Act XX of 1847.

6th.—Declarations of Owners of Presses and Periodicals under Act XX of 1867.

7th.—Registers of British Ships, Act X of 1841.

8th.—Registers of Log Books, Act I of 1859.

9th.—Registers kept under the Oudh Land Revenue Act, XVII of 1876.

**Certified and Examined Copy.**—“The difference between a certified and examined copy is, that the former is made by an official whose duty it is to furnish copies to parties who have an interest in the subject-matter and a right to apply for them on payment or otherwise. The latter are those which any private individual makes

from the original, with which, having compared it by examination, he is enabled to swear that it is a true copy."—Norton, sec. 455.

**Records of Civil Courts.**—Sections 217 and 580 of the Code of Civil Procedure provide for copies of the judgment and decree of first instance and on appeal. The following rules have been framed by the Calcutta High Court on the subject of furnishing certified copies of the records of a Civil case to parties or others :— (1). A plaintiff, or a defendant, who has appeared to the suit, is entitled at any stage of the suit to obtain copies of the records of the suit, including exhibits, which have been put in and finally accepted by the Court as evidence. A party who has been ordered to file a written statement is not entitled to inspect or take a copy of a written statement filed by another party until he has filed his own. (2). A stranger to the suit may, after decree, obtain, as of course, copies of the plaint, written statements, affidavits, and petitions filed in the suit; and may, for sufficient reason shown to the satisfaction of the Court, obtain copies of any such documents before decree. (3). A stranger to the suit may also obtain, as of course, copies of judgments, decrees or orders at any time after they have been passed or made. (4). A stranger to the suit has no right to obtain copies of exhibits put in evidence, except with the consent of the person by whom they were produced. *Vide* General Rules and Circular Orders, Part I, Chapter IV, Rule 6, p. 120.

**Records of Criminal Courts.**—(a). In the exercise of the powers conferred by sec. 35 of the Court Fees Act, VII of 1870, and in supercession of previous notifications, the Governor-General in Council remitted the fees payable under the said Act on the following documents, namely :—

1. Copy of a charge under sec. 210 of the Code of Criminal Procedure, 1882, or of a translation thereof, when the copy is given to an accused person.

2. Copy of the evidence of supplementary witnesses after commitment, when the copy is given under sec. 219 of the said Code to an accused person.

3. Copy or translation of a judgment in a case other than a summons-case, and copy of the heads of the Judge's charge to the jury, when the copy or translation is given under sec. 371 of the said Code to an accused person.

4. Copy or translation of a judgment in a summons-case, when the accused person to whom the copy or translation is given under sec. 371 of the said Code is in jail.

5. Copy of an order of maintenance, when the copy is given under sec. 490 of the said Code to the person in whose favor the order is made, or to his guardian, if any, or to the person to whom the allowance is to be paid.

6. Copy furnished to any person affected by a judgment or order passed by a Criminal Court of the Judge's charge to the jury, or of any order, deposition or other part of the record, when the copy is not a copy which may be granted under any preceding clause of this notification without the payment of a Court-fee, but is a copy which on its being applied for under sec. 548 of the said Code, the Judge or Magistrate, for some special reason to be recorded by him on the copy, thinks fit to furnish without such payment.

7. Copies of all documents furnished under the orders of any Court or Magistrate to any Government Advocate or Pleader, or other person specially empowered in this behalf for the purpose of conducting any trial or investigation on the part of the Government before any Criminal Court.

8. Copies of all documents which any such Advocate, Pleader or other person is required to take, in connection with any such trial or investigation, for the use of any Court or Magistrate, or may consider necessary for the purpose of advising the Government in connection with any criminal proceedings.

9. Copies of judgments or depositions required by officers of the Police Department in the course of their duties.

*Vide* Notification, Government of India, No. 310 of 21st January 1886 ; C. O. No. 1 of 12th February 1886. *Vide* also (a) Notification of Government of India, No. 1361 of 24th June 1881 ; C. O. No. 9 of 7th September ; (b) Notification, Government of India, No. 2520 of 5th April 1872 ; (c) *Gazette of India*, 1873, p. 590.

(d). An accused is entitled to get copies of depositions of witnesses, on payment of the legal fees therefor. *Vide* secs. 210 and 548 of Act X of 1882.

(e). All prosecutors whose charges are dismissed, are affected by the order of discharge, and are, therefore, entitled to obtain copies of the order made by, and of the depositions taken before, the Magistrate—*Bank of Bengal v. Dinonath Roy*, I. L. R. 8 Cal. 166.

77. Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.

Proof of documents by production of certified copies.

**Private Documents filed in a Suit for Purposes of Evidence.**—This section and the preceding one refer to public documents, and are inapplicable to *kobalas*, &c., filed in a suit for the purposes of evidence—*Haripur Mozumdar v. Charun Manjhi* 22 W. R. 355. *Vide also Krishna Kishore Chowdhurani v. Kisori Lal Rai*, I. L. R. 14 Cal. 486.

**Record of Suit Compromised.**—Where a suit is compromised, and a petition is presented in the usual way, and the Court makes an order confirming the agreement which with the order, as well as the agreement and power-of-attorney, are all entered upon record, these papers become as much a part of the record in the suit as if the case had been tried, and judgment given between the parties in the ordinary way ; and that record is a public document and may be proved by an office copy—*Bhagain Megh Rani Koer v. Guru Prasad Singh*, 25 W. R. 68.

**Special Condition Entry in Register of Mahummedan Marriage.**—An entry of a 'special condition' in a registry of Mahummedan Marriages under Bengal Act, I of 1876, may be proved by a certified copy—*Khadem Ali v. Tajimunnissa*, I. L. R. 10 Cal. 608.

**Copy of Plaint.**—In *Mahomed Sahabudin v. Wedgeberry*, 10 B. L. R. App. 31, the Court admitted the certified copy of a plaint as evidence. This ruling is of doubtful authority.

Proof of other  
official docu-  
ments.

78. The following public documents may be proved as follows :—

(1) Acts, orders or notifications of the Executive Government of British India in any of its departments, or of any Local Government or any department of any Local Government,

By the records of the departments, certified by the heads of those departments respectively,

Or by any document purporting to be printed by order of any such Government :

(2) The proceedings of the Legislatures,

By the journals of those bodies respectively, or by published Acts or abstracts, or by copies purporting to be printed by order of Government :



(3) Proclamations, orders or regulations issued by Her Majesty or by the Privy Council, or by any department of Her Majesty's Government,

By copies or extracts contained in the *London Gazette*, or purporting to be printed by the Queen's Printer.

(4) The acts of the Executive or the proceedings of the Legislature of a foreign country,

By journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some public Act of the Governor-General of India in Council :

(5) The proceedings of a municipal body in British India,

By a copy of such proceedings, certified by the legal keeper thereof, or by a printed book purporting to be published by the authority of such body :

(6) Public documents of any other class in a foreign country,

By the original, or by a copy certified by the legal keeper thereof, with a certificate under the seal of a Notary Public, or of a British Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country.

**Proof of Public Documents under English Law.**—(a). The Documentary Evidence Act, 1868, 31 and 32 Vict. Cap. 37, and 34 and 35 Vict. Cap. 70, provide for the proof of the contents of proclamations

by Her Majesty or by the Privy Council and various officials by copies certified by the several officials therein denoted.

(b). *Lord Brougham's Act*, 14 and 15 Vict. Cap. 99, sec. 7, and 28 and 29 Vict. Cap. 63, sec. 6, provide for the proof in England and Ireland of proclamations, treaties and other Acts of State of Foreign States, or of British Colonies, and of judgments, decrees, orders and other judicial proceedings of Courts in such States or Colonies.

(c). The Naturalisation Act, 1870, 33 Vict. Cap. 14, sec. 12, provides for the proof of declarations, certificates and entries under the Act.

(d). As to regulations made by the Board of Trade under the Merchant Shipping Act, Amendment Act, see 25 and 26 Vict. Cap. 63, sec. 26.

Of any other class, means, than those mentioned in sub-section (4).

**Proof by Recitals in Statutes, Acts, &c.**—*Vide* sec. 37 *ante*.

**Presumptions as to Seals, Signatures, &c.**—*Vide* sec. 82 *post*.

### *Presumptions as to Documents.*

79. The Court shall presume every document purporting to be a certificate, certified copy, or other document, which is by law declared to be admissible as evidence of any particular fact, and which purports to be duly certified by any officer in British India, or by any officer in any Native State in alliance with Her Majesty, who is duly authorized thereto by the Governor-General in Council, to be genuine :

Presumption as to genuineness of certified copies.

Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf.

The Court shall also presume that any officer by whom any such document purports to be signed or certified held, when he signed it, the official character which he claims in such paper.

**Application of the Section.**—This section applies only to certificates, or other documents which purport to be duly certified by

any officer in British India, or by any officer in any Native State in alliance with Her Majesty. The last clause of the section provides for presumption as to official character. Evidence may be given by the party against whom such copy is sought to be used, to show that the certificate, certified copy, or other document is not genuine, or that the officer by whom such document purports to be signed or certified does not hold the official character which he claims in such paper.

**When Original to Pbe reduced.**—On a trial for perjury, in any affidavit, deposition or answer, or for forgery with respect to any record, the original, if in existence, must be produced—*R. v. Milner, 2 Foster and Finlason, 10*. So, also, if there be any question as to the *existence* or *contents* of the record.

80. Whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence, or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume that the document is genuine; that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken.

**Scope of the Section.**—The rule here laid down refers only to judicial records of Courts in Her Majesty's dominions. The section provides *inter alia*, that the Court shall presume that the evidence or confession was duly taken. This presumption gives rise to the other presumption that the document contains the actual statements of the person said to have made them, and, in the absence of any evidence to the contrary, that the signature is that of the accused person.\* It is, however, necessary that the evidence should purport

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\* *Vide Titu Maya v. The Queen, I. L. R. 8 Cal. 618 (note).*

to have been recorded in accordance with the provisions of Chapter XV of the Civil Procedure Code, in civil matters, and of Chapter XXV of the Criminal Procedure Code, in criminal cases ; as to confessions, the provisions of sections 164 and 533 should be observed. Statements made by persons to Police-officers during the course of a Police enquiry do not, therefore, come within the purview of this section. Statements reduced to writing by a Police-officer under section 162, Criminal Procedure Code, cannot have the effect of a deposition.\*

**Deposition of a Witness when admissible in Evidence against him in subsequent Proceeding.**—(a). A deposition given by a person is not admissible in evidence against him in a subsequent proceeding without its being first proved that he was the person who was examined and gave the deposition—*Queen-Empress v. Durga Sonar*, I. L. R. 11 Cal. 580.

(b). The deposition of a witness in a civil suit taken down in a language other than that in which the evidence was given is not admissible in evidence in a prosecution against him for perjury in respect of the statements made by him, unless the provisions of sections 182 and 183 of the Civil Procedure Code, Act X of 1877, have been complied with—*In the matter of Mayadeb Gossami*, I. L. R. 6 Cal. 762.

(c). A deposition given by a witness in a mutation case is a document entitled to be received as evidence in a subsequent suit—*Budree Lal v. Bhoosee Khan*, 25 W. R. 134.

(d). In a case of giving false evidence, the English record written by the Magistrate was put in to prove what the accused had stated before him. The document was not interpreted to the accused in the language in which it was given, or which he understood ; nor was it read over in accordance with the requirements of sec. 339, Code of Criminal Procedure, in the presence of the person then accused. *Held*, that the English record of the Magistrate was not legal evidence of what the prisoner said before the Magistrate—*The Queen v. Mungul Dass*, 23 W. R. (Cr.) 28.

(e). In the case of *Queen v. Gonouri*, 22 W. R. (Cr.) 2, the deposition of the prisoner given in Hindustani, but taken in English by the Magistrate, and the memorandum at the foot of the deposition that it was read to the witness and was by him acknowledged to be correct, though held not to be quite satisfactory (as the person who took down in English what the prisoner had said in Hindustani was not examined as a witness, and the prisoner had no opportunity of

\* Vide 1. *Raghuni Singh v. Empress*, I. L. R. 9 Cal. 455.

2. *Queen-Empress v. Sitaram Vithal*, I. L. R. 11 Bom. 657.

cross-examining him) was admitted as a proper deposition within the provisions of Act X of 1872, and the memorandum was taken under this section as evidence of the facts stated in it and as affording some evidence that the translation was correct.

(f). The confession of a witness in the shape of a former deposition can be used as evidence against a prisoner only on the condition prescribed by sec. 249, Cr. P. Code (Act X of 1872); that is, it must have been duly taken by the committing officer in the presence of the person against whom it is to be used. The certificate of the Magistrate appended to such confession, in order to afford *prima facie* evidence under this section of the circumstances mentioned in it relative to the taking of the statement, ought to give the facts necessary to render the deposition admissible under sec. 249—*Queen v. Nussuridin*, 21 W. R. (Cr.) 5.

(g). The failure of the Civil Court in a case of perjury to make a memorandum of the evidence of the accused when examined before it does not vitiate the depositions, if the evidence itself was duly recorded in the language in which it was delivered in such Court—*Behari Lal Bose and others*, 9 W. R. (Cr.) 69.

(h). A revenue official was charged with the offence of attempting to receive a bribe from certain raiyats who gave evidence for the prosecution, and he was convicted. He subsequently charged the raiyats with having conspired to bribe him, and in their trial their depositions in the previous case were tendered in evidence for the prosecution. *Held*, that the depositions should have been admitted in evidence—*Queen-Empress v. Samiappa*, I. L. R. 15 Mad. 63. (*Vide* case of *The Queen v. Gopal Dass*, I. L. R. 3 Mad. 271).

**Deposition of Medical Witness.**—(a). Before the deposition of a medical witness taken by a committing Magistrate can, under sec. 509 of the Code of Criminal Procedure, be given in evidence at the trial before the Court of Session, it must either appear from the Magistrate's record, or be proved by the evidence of witnesses, to have been taken and attested by the Magistrate in the presence of the accused. The Court is neither bound to presume under this section, nor ought it to presume under sec. 114, ill. (e), that the deposition was so taken and attested. A Magistrate should take and attest a deposition in the presence of the accused, and should also, by the use of a few apt words on the face of the deposition, make it apparent that he has done so—*Kachali Hari v. Queen-Empress*, I. L. R. 18 Cal. 129.

*Vide* also 1. *Queen-Empress v. Riding*, I. L. R. 9 All. 720.

2. *Queen-Empress v. Papp Singh*, I. L. R. 10 All. 174.

**Confession.**—(a). A confession of an accused person recorded by the Magistrate of Bhind in Gwalior, was held admissible in evidence under this section and probably under sec. 74 *ante*, as against the person by whom it was made, when the said accused was on his trial in a British Court of Justice—*Queen-Empress v. Sunder Singh and others*, I. L. R. 12 All. 595.

(b). As to recording confessions in English, *vide* 1, *Queen-Empress v. Nilmadhab Mittra*, I. L. R. 15 Cal. 595; 2, *Queen-Empress v. Viran and others*, I. L. R. 9 Mad. 224; 3, *Empress v. Anantaram*, I. L. R. 5 Cal. (F. B.) 954.

*Vide* notes to secs. 29 and 33 *ante*.

81. The Court shall presume the genuineness of every document purporting to be the *London Gazette* or the *Gazette of India*, or the Government Gazette of any Local Government, or of any colony, dependency or possession of the British Crown, or to be a newspaper or journal, or to be a copy of a private Act of Parliament printed by the Queen's Printer, and of every document purporting to be a document directed by any law to be kept by any person if such document is kept substantially in the form required by law and is produced from proper custody.

Presumption as to Gazettes, newspapers, private Acts of Parliament, and other documents.

**Proper Custody.**—Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable. See explanation to sec. 90 *post*.

*Vide* sec. 37 *ante*.

82. When any document is produced before any Court, purporting to be a document which, by the law in force for the time being in England or Ireland, would be admissible in proof of any particular in any Court of Justice

Presumption as to document admissible in England and without proof of seal or signature.

in England or Ireland, without proof of the sale or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed, the Court shall presume that such seal, stamp or signature is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims, and the document shall be admissible for the same purpose for which it would be admissible in England or Ireland.

**Documents which, under the Provisions of the English Statute Law, can be proved by certified Copies, and which are of likely occurrence in Indian Courts.**—Registers of Births, Marriages and Deaths made pursuant to the Registration Act, 6 and 7 W. IV c. 86 ; Registers of Marriages of British Subjects which, since 28th July 1849, have been kept by British Consuls, and certified copies of which have been transmitted to the Registrar-General, 12 and 13 Vic. c. 68, sec. 11 ; Registers of British Ships and all declarations made under the Merchant Shipping Act, 1854, Part II, as to ownership, measurement, and registry of British Ships, 17 and 18 Vic. c. 104, sec. 107 ; the Regulations for preventing collisions at sea, and the rules concerning lights, fog-signals, steering and sailing may be proved either by the production of the *Gazette* in which any order in Council concerning them is published, or a copy of them purporting to be signed by one of the Secretaries or Assistant Secretaries to the Board, or to be sealed with the seal of the Board. Documents transmitted by shipping masters and officers of customs to the Registrar-General of Seaman, under 17 and 18 Vic. c. 104, sec. 277, may also be proved by a certified copy.—Taylor, sec. 1602.

**Documents receivable under English Law without Proof of Seal or Signature.**—*Vide* 33 and 34 Vic. c. 52 ; 14 and 15 Vic. c. 99, sec. 7 ; sec. 2 of the Documentary Evidence Act, 8 and 9 Vic. c. 113 ; see 9 of Lord Brougham's Act, 14 and 15 Vic. c. 99. *Vide* also cl. 6, sec. 57 *ante*.

83. The Court shall presume that maps or plans purporting to be made by the authority of Government were so made, and are accurate ; but maps or plans

Presumption as to maps or plans made by authority of Government.

made for the purposes of any cause must be proved to be accurate.

*Vide* notes to sec. 36 *ante*.

**Accurate.**—(a). The word accurate means accuracy of the drawing and correctness of the measurement. It certainly does not refer to laying boundaries according to the rights of parties—*Omirta Lal Chowdhury v. Kali Persaud Saha*, 25 W. R. 179.

(b). The accuracy of a thackbust map must be presumed under this section—*Niamatullah Khadim v. Himmud Ali Khadim*, 22 W. R. 519.

(c). The fact that a survey map, made by the authority of the Government, has been annulled and superseded by an order of the Board of Revenue, and that a fresh survey has been taken, and a map made in accordance therewith, does not affect the presumption allowed under this section, as to the accuracy of the former survey map—*Juggeshur Singh v. Bycanta Nath Dutt*, I. L. R. 5 Cal. 822.

(d). The statements in thackbust map made at a revenue survey, of lands being *debutter*, appeared on the face of it to have been made as pointed out by agents on behalf of the proprietor of the mouzah and the principal tenants in the presence of the agents of the holders of estates in the neighbouring mouzahs. The Amin, who made the map, had to lay down boundaries, but had no authority to decide what lands were *debutter*. This section has not the effect of making those statements' evidence—*Jurao Kumari v. Lalommoni*, I. L. R. 18 Cal. (P. C.) 224.

**Inadmissible Documents.**—(a). **Chittahs.**—Chittahs made by Government for its own private use are nothing more than documents prepared for the information of the Collector, and are not evidence against private persons for the purpose of proving that the lands described therein are of a particular description or tenure—*Ram Chundra Sao v. Bunshidhar Naik*, I. L. R. 9 Cal. 741.

**Map prepared by Government Officer in charge of Khas Mehal.**

—(a). A map prepared by an officer of Government while he was in charge of a *Khas Mehal*, the Government being in possession of that mehal merely as a private proprietor, does not come within the purview of this section. It cannot be presumed to be accurate, but it is admissible under sec. 13, as evidence of possession or assertion of right—*Janmajai Mullick v. Dwarkanath Mahanti*, I. L. R. 5 Cal. 287.



84. The Court shall presume the genuineness of every book purporting to be printed or published under the authority of the Government of any country, and to contain any of the laws of that country, and of every book purporting to contain reports of decisions of the Courts of such country.

Presumption as to collections of laws and reports of decisions.

*Vide* Act XVIII of 1875 (The Indian Law Reports Act).

*Vide* secs. 38, 57, 74 and 78 *ante*.

85. The Court shall presume that every document purporting to be a power-of-attorney, and to have been executed before, and authenticated by, a Notary Public, or any Court, Judge, Magistrate, British Consul or Vice-Consul, or representative of Her Majesty or of the Government of India, was so executed and authenticated.

Presumption as to powers-of-attorney.

The provisions of sec. 33, Act III of 1877 (Registration Act) as to powers-of-attorney recognized for the purposes of that Act, are not affected by the present Act.

**Notary Public.**—*Vide* 41 Geo. III, Cap. 79 ; 3 and 4 Will. IV, Cap. 70 ; 6 and 7 Vic. Cap. 90, and 18 and 19 Vic. Cap. 42.

The Negotiable Instruments Act, XXVI of 1881, provides for the appointment of persons by the Governor-General in Council to perform the functions of a Notary Public under the Act. (Secs. 3, 99, 100 and 102).

(a). A registered power-of-attorney was admitted as evidence under Act I of 1872, sec. 57, without proof, the registering officer being a Court under sec. 3 of the Act—*Krishna Koondoo v. T. F. Brown*, I. L. R. 14 Cal. 176. This case has been dissented from in *Salimatul Fatima v. Koylaskpoti Narain Singh*, I. L. R. 17 Cal. 903.

86. The Court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of Her Majesty's

Presumption as to certified copies of foreign judicial records.

dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of Her Majesty or of the Government of India in or for such country to be the manner commonly in use in that country for the certification of copies of judicial records.

An officer who, with respect to any territory or place not forming part of Her Majesty's dominions, is a Political Agent therefor, as defined in sec. 3 of the Foreign Jurisdiction and Extradition Act, 1879, and sec. 190 of the Code of Criminal Procedure, 1882, shall, for the purposes of this section, be deemed to be a representative of the Government of India in and for the country comprising that territory or place.

In *Ghani Mahomed Sarkar v. Tarini Charan Chakravarti*, I. L. R. 14 Cal. 546, their Lordships held that there is now no representative of Her Majesty or of the Government of India, residing in Kuch Behar, and consequently, that certified copies of judicial records of that State could not be received in the Courts of British India, under the provisions of this section as it then stood. After the decision of the above case, the latter clause of the section was added by sec. 8, Act III of 1891.

In *Srimatty Manmohiny Dassi v. Grish Chundra Boss*, 8 M. J. 14, the copy of a foreign judgment, which was sworn to by a witness as having been duly sealed and certified by the Registrar of the Foreign Court, but which was not, according to the present section, certified by the representative of Her Majesty or of the Government of India, was admitted in evidence.

Sec. 13, Explanation 6 of Act X of 1882 (The Code of Civil Procedure) declares that "where a foreign judgment is relied on, the production of the judgment, duly authenticated, is presumptive evidence that the Court which made it had competent jurisdiction, unless the contrary appear on the record, but such presumption may be removed by proving the want of jurisdiction."

87. The Court may presume that any book to which it may refer for information on matters of public or general interest, and that any published map or chart, the statements of which are relevant

facts, and which is produced for its inspection, was written and published by the person, and at the time and place, by whom or at which it purports to have been written or published.

*Vide* notes to sec. 36 *ante*.

88. The Court may presume that a message, forwarded from a telegraph office to the person to whom such message purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be sent; but the Court shall not make any presumption as to the person by whom such message was delivered for transmission.

In England the original message is the best evidence, and in the absence of proof that the original has been destroyed, no copy is admissible in evidence—*R. v. Regan* (16 Cox. C. C. 203).

*Vide* sec. 62, Explanation 2, and sec. 63, cl. 2.

89. The Court shall presume that every document, called for and not produced after notice to produce, was attested, stamped and executed in the manner required by law.

Presumption as to due execution, &c., of documents not produced.

According to the English authorities a document, which is lost, will be presumed to be duly stamped until the contrary is shown—*Pooley v. Goodwin*, 4 A. and E. 94.

Read along with this section, sec. 66 *ante*, and sec. 164 *post*.

90. Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports

Presumption as to documents thirty years old.

to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

*Explanation.*—Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable. This explanation applies also to section eighty-one.

### *Illustrations.*

(a). A has been in possession of landed property for a long time. He produces from his custody deeds relating to the land showing his titles to it. The custody is proper.

(b). A produces deeds relating to landed property of which he is the mortgagee. The mortgagor is in possession. The custody is proper.

(c). A, a connection of B, produces deeds relating to lands in B's possession, which were deposited with him by B for safe custody. The custody is proper.

**Reason of the Rule.**—As ancient documents often furnish the only attainable evidence of ancient possession, the law, on the principle of necessity, allows them to be read in Courts of Justice on behalf of persons claiming under them, and against persons in no way privy to them, provided that they are not mere narratives of past events, but that they purport to have formed a part of the act of ownership, exercise of right, or other transaction to which they relate. No doubt, this species of proof deserves to be scrutinized with care; for, its effect is to benefit those who are connected in interest with the original parties to the documents which are not *proved*, but are only *presumed* to have constituted part of the *res gesta*. Still, as forgery and fraud are, comparatively speaking, of rare

occurrence, and as a fabricated deed will generally, from some anachronism or other inconsistency, afford internal evidence of its real character, the danger of admitting these documents is less than might be supposed ; and, at any rate, it is deemed more expedient to run some risk of occasional deception than to permit injustice to be done by strict exclusion of what, in many cases, would turn out to be highly material evidence. On a balance, therefore, of evils, this kind of proof has, for many years past, been admitted, subject to certain qualifications. *Vide* Taylor's *Evi.*, secs. 593 and 658. This section makes it unnecessary to call the attesting witness, or, indeed, to give any other proof of a deed thirty years old or upwards, and coming from an unsuspected repository ; unless, perhaps, when there is an erasure or other blemish in some material part of it. Should the genuineness of the document be for any reason doubtful, it is perfectly open to the Court or jury to reject it, however ancient it may be.

**Scope of the Section.**—This rule of ancient documents is sometimes stated with the qualifications, provided that possessions be proved to have followed similar documents, or that there is some proof of actual enjoyment in accordance with the title to which the document related. And, certainly, in the case of property allowing of continuous enjoyment, without proof of actual exercise of the right, any number of mere pieces of paper or parchment purporting to be leases or licenses ought to be of no avail. It may be a question whether the absence of the proof of enjoyment consistent with such documents goes to the admissibility or only to the weight of the evidence, probably the latter—*Malcolm Aon v. O. Dea*, H. L. 393 ; P. W. 614. *Vide* Norton's Evidence.

**How much credit to be given to such Evidence.**—(a). In *Phul Bibi v. Gour Saran Das*, 18 W. R. 485, Couch C. J. observed : “ We feel obliged to say that this reason has not the same weight in this country as it is supposed to have in England, and here less credit should be given to ancient documents which are unsupported by any evidence that might free them from the suspicion of being fabricated. Even in England this evidence when unsupported is of very little weight.”

(b). Although ancient documents are admissible in evidence on proof that they have been produced from proper custody, their value as evidence when admitted must depend in each case upon the corroboration derivable from external circumstances, *e.g.*, from the documents having been produced on previous occasions upon which they would naturally have been produced, if in existence at the time,

or from acts having been done under them—*Boykant Nath Kundu v. Lukhan Manjhi*, 9 C. L. R. 425. In this case Field J. made the following observations: "Our experience in this country tells us that forgery and fraud are not of such rare occurrence in India as they are in England; and therefore it behoves us to scrutinize this kind of evidence with more care in this country than may be necessary in the country with direct reference to which the above quoted remarks (*vide* Taylor, secs. 593 and 658) were used. Then, further, the possibility of discovering fabrication by an anachronism or other inconsistency is much less in this country than in England. In the first place written instruments are not so common, and the materials for comparison are therefore fewer. Then the care with which a case is prepared for trial, the industry with which evidence is sought out and brought forward are much less, regard being had to the average skill and experience of mufasil practitioners and those agents who have the management of the greater portion of the litigation in the mufasil."

(c). In *Trailokia Nath Nandi v. Shurno Chungoni*, I. L. R. 11 Cal. 539, Garth C. J. observed: "I need hardly say that the more frequent fraud and forgery are, the more care and caution is necessary in applying this rule, because nothing can be more easy than for an unscrupulous person, who is wrongfully in possession of property, and wants to make out a title to it, to forge a deed in his own favour more than thirty years old, and then produce it himself in Court, and say that, because he is in possession of the land, he must be the proper custodian of the deed, and so relieve himself from the necessity of proving the execution of the instrument."

(d). The degree of credit to be given to a document more than thirty years old, which has been admitted in evidence, depends on circumstances, chiefly on the proof of transactions or states of affairs necessarily, or at least properly or naturally, referable to it—*Hari Chintamani Dikshit v. Moro Lakshan*, I. L. R. 11 Bom. 89.

**Computation of period of thirty years.**—(a). In applying the presumption allowed by this section, the period of thirty years is to be reckoned, not from the date upon which the document is filed in Court, but from the date on which, it having been tendered in evidence, its genuineness or otherwise becomes the subject of proof—*Minu Sarkar v. Rhedoy Nath Roy*, 5 C. L. R. 135.

**Proper Custody.**—The following observations of Chief Justice Tindal, in the case of *Bishop of Meath v. The Marquess of Winchester*, 3 Bing. (N. C.) 183, are worthy of special attention. He, in speaking of documents found in a place in which, and under the

care of persons with whom such papers might naturally and reasonably be expected to be found, says : " And this is precisely the custody which gives authenticity to documents found within it, *for it is not necessary that they should be found in the best and most proper place of deposit*. If documents continue in such custody, there never would be any question as to their authenticity, but it is when documents are found in other than their proper place of deposit, that the investigation commences *whether it was reasonable and natural, under the circumstances in the particular case*, to expect that they should have been in the place where they are actually found ; for it is obvious that, while there can be only one place of deposit strictly and absolutely proper, there may be various and many that are reasonable and probable though differing in degree, some being more so, some less, and in those cases the proposition to be determined is, whether the actual custody is so reasonably and probably to be accounted for that it impresses the mind with the conviction that the instrument found in such custody must be genuine."

(a). Where a daughter professed to hold under a *pottah* more than thirty years old, in favour of her father, and was found to have been in possession of the land ever since her father's death for a period of forty years without interruption on the part of the father's heirs : *held*, that the daughter's custody of the *pottah* was a natural and proper custody within the meaning of this section—*Trailokhia Nath Nandi v. Skurno Chungoni*, I. L. R. 11 Cal. 539.

(b). Where a document purported to be 45 years old, and a mohorror swore to its having been in his custody as keeper of plaintiff's records for the time of his service, *viz.*, for the last 15 years, the evidence was held to show (if credible) that the document had come from the proper custody within the meaning of this section and to require no direct evidence of its genuineness—*Ekkowri Singh v. Koylask Chunder Mukerji*, 21 W. R. 45.

(c). A document more than 30 years old, although not requiring to be formally attested by the witnesses who attended its execution, must be shown to have come from the proper person to keep it—*Tacoor Persaud v. Must. Rasmatty Koer*, 24 W. R. 428.

(d). In the case of *Chunder Kant Mistri v. Braja Nath Bysack*, 13 W. R. 109, Phear J. observed : " If the custody, so far as the witness can speak, has been and is the custody in which, judging from the purport of the document itself and the other circumstances of the case, it would naturally be expected to reside, then the document ought to be treated as authentic to such extent as to become admissible in evidence between the parties. The Judge in this case seems to think that it would be necessary to go behind the possession

of the present owner, and in all cases to trace the possession of the document back through all changes of hands to the date of its origin. If that be the Judge's view, I think he goes too far."

(e). Where a *kobala*, upwards of thirty years old, was produced from proper custody and offered in evidence, but rejected by the lower Appellate Court as not genuine, because evidence had not been given that it had remained in the custody of the parties after the death of their father, and because it had not been filed in any public office, and no mention made of the purchase in the mufasil or at the sudder station : *held*, that it was erroneous to require such proof, and to overlook the evidence of possession under the *kobala*—*Anand Chunder Pooshali v. Mukta Keshi Debi*, 21 W. R. 130.

(f). A *varaspatra* (deed of heirship) is admissible in evidence, as a document purporting to be more than 30 years old, and produced from a custody, which, under the circumstances of the case, was a proper custody, the possession of the gomastah being legally the possession of his master.—*Harichintamon Dikshit v. Moro Lukshman*, I. L. R. 11 Bom. 89.

(g). In the case of *Devaji Gyrji v. Godabhai Godbhai*, 11 W. R. (P. C.) 35, the Lords of the Privy Council said : "With reference to the argument as to the evidence in support of this bond, and particularly with respect to the custody of the bond, it is, in their Lordships' opinion, sufficient to state that the bond was produced in the usual manner by the persons who *claimed title under the provisions of it*, and who, therefore, were entitled to the possession of it ; so that the bond must be held to have come from the proper custody."

#### **Presumption of genuineness of Documents thirty years old.—**

(a). A Court is not bound to accept as genuine the signature on a document upwards of thirty years old, even though it be produced from proper custody. Before accepting such document as proof of title, the Court must satisfy itself that the person who purports to have affixed his signature to the document, was a person who, at the time, was entitled to grant such a document.—*Uggrakant Chowdhary v. Hurro Chunder Sikdar*, I. L. R. 6 Cal. 209.

(b). No legal presumption can arise as to the genuineness of a document, more than thirty years old, merely upon proof that it was produced from the records of a Court in which it had been filed at some time previous. It must be shown that the document had been so filed in order to the adjudication of some question of which that Court had cognizance, and which had come under the cognizance of such Court.—*Gadudhar Pal Chowdhary v. Bhyrab Chunder Bhattachari*, I. L. R. 5 Cal. 918.



(c). In the case of *Bisheshwar Bhattacharji v. George Henry Lamb*, 21 W. R. 22, their Lordships of the Privy Council observed: "The document itself was not proved, because it was more than thirty years old, and there were no witnesses to prove it. It was therefore necessary, in order to establish its authenticity, to show that possession had accompanied it."

(d). Where a sunnud bearing a seal and purporting to be upwards of thirty years old was tendered as evidence but was not admitted by the opposite party; *held*, that the party tendering it ought, at least, to have adduced such evidence as he was able of custody, and of payment of rent or other acts done according to its terms—*G. H. Grant v. Byjnath Tewari*, 21 W. R. 279.

(e). "Sec. 90 of the Evidence Act says only that the Court may presume that documents purporting to be more than thirty years old are genuine, not that it must presume them to be so, and experience teaches us that 'may presume' in such instances ought generally to be construed in the more rigorous of the senses allowed by section 4 of the Act. The illustrations, indeed, to sec. 90, are all cases of deeds relating to land produced by the person in possession, or by one to whom the person in possession has committed the custody of the documents. They do not extend to the documents by which a person out of possession strives to reduce the possession actually enjoyed by another to a temporary or limited interest: and it would be very unsafe to presume that the counterpart of a mortgage with possession by A to B for thirty-one years had really been executed by A and B when brought forward thirty-one years after its ostensible date by A's son for the purpose of depriving B's son of the property of which he was in possession, and should therefore be presumed to be the owner according to sec. 110 of the Evidence Act. Such a document would be admissible as coming from proper custody, and such cases as *Doe de Neale v. Samples*, (8 A. and E. 151) sanction a liberal construction of what may be deemed proper custody; but a document, thus adduced, without possession to support it and without proof of any act done in connection with it, would generally have almost no weight in this country as a ground of inference." *Vide* Remarks of West J., in *Timangaveda v. Rangangarda*, I. L. R. 11 Bom. 98.

(f). When a document, more than thirty years old, purports to be signed by an agent on behalf of a principal, there is no presumption as to the agent's authority, which must be proved—*Abilak Rai v. Dillial Rai*, I. L. R. 3 Cal. 557.

(g). No legal presumption can arise as to the genuineness of a document more than thirty years old, merely upon proof that it was

produced from the records of a Court in which it had been filed at some time previous. It must be shown that the document had been so filed in order to the adjudication of some question of which that Court had cognizance, and which had come under the cognizance of such Court—*Gad idhar Pal Chowdhary v. Rup Chunder Bhattacharji*, I. L. R. 5 Cal. 918.

**Secondary Evidence.**—If a document be shown to have been lost in proper custody, and to be more than thirty years old, secondary evidence of its contents may be given under section 65, cl. (c), and this section without proof of execution—*Khettra Chunder Mookerji v. Khetter Pal Shritiratna*, I. L. R. 5 Cal. 886.

**Miscellaneous.**—(a). A statement made before a Collector in a mutation proceeding is a document entitled to be received as evidence under this section, if it had been made thirty years ago—*Budree Lal v. Bhooses Khan*, 25 W. R. 134.

(b). In a criminal case, where a letter is proved to have come from the custody of a prisoner, it may be used in evidence against him without proof of his handwriting—*Laver's case*, 16 S. T. 206.

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## CHAPTER VI.

### OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE.

91. When the terms of a contract, or of a grant,

Evidence of  
terms of con-  
tracts, grants and  
other dispositions  
of property re-  
duced to form of  
document.

or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

*Exception 1.*—When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

*Exception 2.*—Wills admitted to probate in British India may be proved by the probate.

*Explanation 1.*—This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document, and to cases in which they are contained in more documents than one.

*Explanation 2.*—Where there are more originals than one, one original only need be proved.

*Explanation 3.*—The statement, in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

### *Illustrations.*

(a). If a contract be contained in several letters, all the letters in which it is contained must be proved.

(b). If a contract is contained in a bill of exchange, the bill of exchange must be proved.

(c). If a bill of exchange is drawn in a set of three, one only need be proved.

(d). A contracts, in writing, with B, for the delivery of indigo upon certain terms. The contract mentions the fact that B had paid A the price of other indigo contracted for verbally on another occasion. Oral evidence is offered that no payment was made for the other indigo. The evidence is admissible.

(e). A gives B a receipt for money paid by R. Oral evidence is offered of the payment. The evidence is admissible.

**Purport of the Section.**—There is no English statute which contains provisions exactly corresponding with those of this section and sec. 92. But the Act contains in these two sections the rule of the English common law, very slightly modified by equitable considerations. The justification of its adoption has been that a Court will not allow a rule, nor even a statute, which was introduced to suppress fraud, to be the most effectual promotion and encouragement of fraud.

This section broadly lays down that (1) in the case of records and other instruments which the policy of the law requires to be in writing and executed with prescribed formalities, and (2) when a contract, grant or other disposition of property is reduced to writing, no derivative and consequently no verbal or other parol evidence of their contents is receivable, until the absence of the original writing is accounted for. The writing itself is not only the best, but is the only admissible evidence of the matter which it contains. A writing is presumed, as a general rule, to embody the final and considered determinations of the parties to a transaction, and is a safeguard against bad faith and bad memory.

**Non-applicability of the Section.**—This section applies only to evidence given in proof of the terms of a contract, and therefore *the fact of there being a contract* may be proved by oral evidence, though it has been reduced to writing, and any party to any document or any representative in interest of any such party may prove any such fact for any purpose other than that of varying or altering any right or liability depending upon the terms of the document. Where a written instrument or document of any description is not a fact in issue, and is merely used as evidence to prove some *act*, independent proof *aliunde* is receivable. Thus, although a receipt has been given for the payment of money, proof of the fact of payment may be made by any person who witnessed it. Or, for instance, where the question was whether A had obtained money from B on false pretences, the false pretence being the consideration for a partnership; B was allowed to prove that the false pretence was something other than the consideration recited in the partnership deed.\*

**Illustrations.**—Illustrations (d) and (e) give examples of matters, the mention of which, in a document, does not preclude their proof *aliunde*: in (d) because the fact mentioned is not one of the terms of the contract: in (e) because a memorandum or receipt is not a

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\* *Vide* Best on Evi., 8th Ed., 206.  
*R. v. Adamson*, 2 Moody 286; *Stephen's Digest*, art. 92.

"contract, grant or disposition of property," and therefore no mention of any fact in a receipt interferes with its being proved in any other manner.

(a). According to the illustration (e) of this section, the payment acknowledged in a receipt may be proved either by the receipt or by oral evidence, and the reason of this rule is stated to be that the existence of the receipt forms no part of the fact to be proved, and that the receipt itself is nothing more than a collateral or subsequent memorial of that fact, affording a convenient and satisfactory mode of proof—*Venkaryyar v. Venkatasubbayyar*, I. L. R. 3 Mad. 53.

**Classification of Cases falling under the Rule.**—"Mr. Taylor reduces to *three classes*, the cases falling under the rule which requires the contents of a document to be proved by the document itself, if its production be possible, *viz.* :—

"I. Oral evidence cannot be substituted for any *instrument which the law requires to be in writing*.

"II. Oral evidence cannot be substituted for the written evidence of any *contract which the parties have put in writing*.

"III. Oral evidence cannot be substituted for any writing, the *existence or contents of which are disputed*, and which is *material to the issue* between the parties, and is not merely the memorandum of some other fact."—Field's Evi., 5th Ed., 417.

**Class I.—Instances of Cases required by Law to be in writing.**—

(a). Wills under Act X of 1865 and Act XXI of 1870, except Wills which may be made orally according to the provisions of Act X of 1865.

(b). Agreements made without consideration (sec. 25, cls. 1 and 3 of Act IX of 1872).

(c). Acknowledgments of liability under sec. 19 of Act XV of 1877, extending the period of limitation.

(d). Sales and exchanges of tangible immoveable property of value of one hundred rupees and upwards and of a reversion or other intangible thing (secs. 54 and 118 of Act IV of 1882).

(e). Mortgages where the principal money secured is one hundred rupees or upwards (sec. 59 of Act IV of 1882).

(f). Leases of immoveable property from year to year or for any term exceeding one year or reserving a yearly rent (sec. 107 of Act IV of 1882).

(g). Gifts of immoveable property (sec. 123 of Act IV of 1882).

(*h*). The depositions of witnesses in civil cases (secs. 182, 184, 185, 186, 187, 189 and 190 of Act XIV of 1882).

(*i*). The depositions of witnesses in criminal cases (secs. 353, 354, 355, 356, 357, 358, 359 and 360 of Act X of 1882).

(*j*). Confessions of accused persons (sec. 164 of Act X of 1882) and examinations of accused persons (sec. 364, *ib.*)

(*k*). Judgments and decrees in civil cases.

(*l*). Judgments and final orders of Criminal Courts.

(*m*). Contracts for reference to arbitration (exception 2, sec. 28 of Act IX of 1872).

(*n*). An authority to encumber an under-tenure (sec. 16 of Act VIII (B.C.) of 1865).

(*o*). Trusts of immoveable and moveable property (sec. 5 of Act II of 1882).

(*p*). *Pattas* and *muchalkas* embodying the terms of tenancies in the Madras Presidency (Mad. Act VIII of 1865).

(*q*). Agreements to pay higher rent (sec. 36 of Oudh Rent Act, XIX of 1868).

(*r*). Agreements by a landlord in Bengal to a division of a tenure or holding (sec. 88 of Bengal Tenancy Act, VIII of 1885).

(*s*). Authority to adopt a son by a talukdar in Oudh (sec. 29 of Oudh Estates Act, I of 1869).

**Instances in which Parol Evidence was held admissible.—**(*a*).

"Where, at the time of letting some premises to the defendant, the plaintiff had read the terms from pencil minutes, and the defendant had acquiesced in these terms, but had not signed the minutes; and where, upon a like occasion, a memorandum of agreement was drawn up by the landlord's bailiff, the terms of which were read over and assented to by the tenant, who agreed to bring a security and sign the agreement on a future day, but omitted to do so; and where, in order to avoid mistakes, the terms upon which a house was let, were, at the time of letting, reduced to writing by the lessor's agent, and signed by the wife of the lessee, in order to bind him; but the lessee himself was not present, and did not appear to have constituted the wife as his agent, or to have recognized her act, further than by entering upon and occupying the premises; and where lands were let by auction, and a written paper was delivered to the bidder by the auctioneer, containing the terms of the letting, but this paper was never signed either by the auctioneer or by the parties; and where, on the occasion of hiring a servant, the master and servant went to the chief constable's clerk, who, in their presence, and by their direction, took down in writing the terms of the hiring, but

neither party signed the paper, nor did it appear to have been read to them; in all these instances the Court held that parol evidence was admissible, since the writings only amounted, either to mere unaccepted proposals, or to minutes capable of conveying no definite information to the Court or Jury, and they could not, by any sensible rule of interpretation, be construed as memoranda, which the parties themselves intended to operate as fit evidence of their several agreements."—Taylor, sec. 406.

(b). Where a question arises (not between mortgagor and mortgagee) as to the previous existence or non-existence of a particular mortgage, the oral evidence of the mortgage that it did exist will be sufficient to prove the fact, without the production of the mortgage deed—*Amjad Ali v. Moniram Kalita*, I. L. R. 12 Cal. 52.

(c). In a suit upon a *hathchitta*, the Court, having regard to the informal nature of the document sued upon, allowed evidence to be given of a verbal agreement to repay the amount acknowledged with interest, no mention having been made as to interest in the *hathchitta* itself—*Umesh Chunder Baneya v. Mohini Mohan Das*, 9 C. L. R. 301.

(d). Independently of the sale certificate any proceedings confirming an auction sale are sufficient evidence of the sale—*Benodi Lal Ghose v. Tamizuddin*, 7 C. L. R. 115. *Vide also*—

1. *Doorga Narain Sen v. Baney Madhab Mazumdar*, I. L. R. 7 Cal. 199.

2. *Tara Prasad Mytee v. Nand Kishore Giri*, I. L. R. 8 Cal. 842.

3. *Sadagopa v. Jamuna Bhai*, I. L. R. 5 Mad. 54.

4. *Velan v. Kumarasami*, I. L. R. 11 Mad. 290.

5. *Shivaram Naryan Mekal v. Ravji Sakharam Pradhan*, I. L. R. 7 Bom. 254.

6. *Muzaffar Husain v. Ali Husain*, I. L. R. 5 All. 297.

7. *Jagan Nath v. Baldeo*, I. L. R. 5 All. (F. B.) 305.

8. *Kushal Panachand v. Bhima Bai*, I. L. R. 12 Bom. 589.

9. *Raj Krishna Mukerji v. Radha Madhav Halidar*, 21 W. R. 349.

(e). Where the contents of a pottah are in any way in question, it is necessary to prove them by the production of the document; where this is not the case, oral evidence of the pottah is admissible—*Kedarnath Joardar v. Shurfoonnissa Bibi*, 24 W. R. 425.

(f). A decree-holder agreed with the employer of his judgment-debtor, who had been arrested in execution of the decree, to discharge the latter from arrest upon the condition that his master would pay the amount of the debt. Accordingly, the master executed a promissory note upon unstamped paper, consequently not receivable

in evidence. *Held*, that the document was not the contract out of which the defendant's liability arose, but was merely a collateral security for the defendant's fulfilment of his promise to pay the debt, and that under the circumstances the plaintiff was entitled to give evidence of the consideration, and to maintain the suit as for money lent apart from the note altogether—*Balbhadar Persaud v. The Maharajah of Betia*, 9 All. (F. B.) 351.

(g). H lent Rs. 85 to D on a pledge of moveable property. D repaid H Rs. 40; and at the time of the repayment acknowledged orally that the balance of the debt Rs. 45 was still due by him. It was agreed between the parties at the same time that D should give H a promissory note for such balance, and that such property should be returned to him. Accordingly D gave H a promissory note for Rs. 45, and the property was returned to him. H subsequently sued D on such oral acknowledgment for Rs. 45 ignoring the promissory note, which being insufficiently stamped, was not admissible in evidence. *Held*, that the existence of the promissory note did not debar H from resorting to his original consideration, nor exclude evidence of the oral acknowledgment of the debt—*Hiralal v. Datadin*, 4 All. 135. *Vide Golap Chand Marwari v. Thakurani Mahakoom Kooari*, I. L. R. 3 Cal. 314.

(h). A receipt for sums paid in part liquidation of a bond hypothecating immoveable property must be registered to render it admissible as evidence. But under illustration (e) of the present section, such payments may, nevertheless, be proved by parol evidence, which is not excluded owing to the inadmissibility of the documentary evidence—*Dalip Singh v. Durga Prasad*, I. L. R. 1 All. 442.

(i). A receipt for earnest-money (Rs. 1,000) for purchase of immoveable property was held inadmissible in evidence for want of registration; but under this section it was held that oral evidence was admissible to prove the payment, notwithstanding the existence of the written receipt—*Waman Ram Chandra v. Dhondiba Krishanji*, I. L. R. 4 Bom. 126.

(j). The document called a *Sodi Razinama* (whereby a party relinquishes his right of occupancy of land in his possession to his landlord, and requests the latter to register the land in the name of another party to whom it has been sold) is not a document of the kind mentioned in this section, and therefore does not exclude the Courts from basing their findings upon other evidence, should any such exist—*Venkatesa v. Sengoda*, I. L. R. 2 Mad. 117.

(k). Where the defendant claimed the property as a preferential heir and also set up an alternative defence of an alleged oral agree-



ment cancelling a registered deed of sale of property by her co-widow and the plaintiffs, the lower Court was of opinion that proviso (4) of this section was a bar to any inquiry into the merits of this defence. *Held*, that the lower Court was wrong. The object of the oral agreement was not to rescind the original transaction, but to transfer any rights, acquired by the plaintiffs, to the defendant, and was an entirely new transaction—*Rakhma Bai v. Tukaram*, I. L. R. 11 Bom. 47.

(d). Where a contract of sale is effected through a broker, who sends *bought and sold* notes to the buyer and seller, the fact that the bought and sold notes did not agree and were not returned by the parties is not positive evidence that the parties did not agree. The contract was made before the notes were written, and the notes were sent by the broker to his principals merely by way of information: and the plaintiff is entitled to give parol evidence of the terms of the contract—*Claston v. Shaw*, 9. B. L. R. 245.

**Acknowledgment of Debt.**—(a). An original account book containing an acknowledgment of a debt had been filed in Court and subsequently lost whilst in Court; *held*, that secondary evidence of such acknowledgment might be given, notwithstanding the words of sec. 19 of the Limitation Act—*Wajibun v. Kadir Buksh*, I. L. R. 13 Cal. 292.

(b). Para. 2, sec. 19 of the Limitation Act, 1877, belongs to that branch of the law of evidence which is dealt with by this section, and ought not to be read in derogation of the general rules of secondary evidence so as to exclude oral evidence of the contents of an acknowledgment which has been lost or destroyed—*Shambhunath Nath v. Ram Chunder Saha*, I. L. R. 12 Cal. 267.

(c). Under sec. 19 of the Limitation Act, XV of 1877, oral evidence of the contents of an acknowledgment cannot be received, nor is there any saving of acknowledgments received or given back before the Act came into operation—*Ziulnissa Ladli Begam Sahab v. Matedev Ratandev*, I. L. R. 12 Bom. 269.

**When parol evidence admissible to show that an apparent sale was in fact a mortgage.**—(a). In the case of *Raksa Lakshman v. Govinda Kanj*, I. L. R. 4 Bom. 594, Melvill J., in a very able and lucid judgment, made the following remarks:—"The rule which, on a consideration of the whole matter, appears to be most consonant both to the statute law and to equity and justice is this, *namely*, that a party, whether plaintiff or defendant, who sets up a contemporaneous oral agreement, as showing that an apparent sale was really a mortgage, shall not be permitted to start his

case by offering direct parol evidence of such oral agreement ; but if it appears clearly and unmistakeably, from the conduct of the parties that the transaction has been treated by them as a mortgage, the Court will give effect to it as a mortgage, and not as a sale ; and, thereupon, if it be necessary to ascertain what were the terms of the mortgage, the Court will, for that purpose, allow parol evidence to be given of the original oral agreement. As was observed by Wigram V. C., in *Dale v. Hamilton*, 5 Hare 381, and also by Jessel M. R., in *Dale v. Ungley* (L. R. 5 Ch. Div. 887), the conduct of the parties shows unequivocally that *some* contract, reconcilable with such conduct, must have taken place between the litigant parties, and the Court is, consequently, compelled to admit evidence of the terms of the contract, in order that justice may be done between the parties."

**Secondary evidence when inadmissible.**—(a). Plaintiff alleged that A and B had sold and conveyed, by an unregistered deed, certain land to the person under whom he claimed. The deed being inadmissible in evidence, B was called to prove the sale. *Held*, that B's evidence should have been rejected, as secondary evidence of the unregistered deed could not be received—*Ram Chunder Halder v. Govind Chunder Sen*, 1 C. L. R. 542.

(b). An insufficiently stamped promissory note having been lost, secondary evidence of its contents was held inadmissible—*Shekh Anbar v. Shekh Khan*, I. L. R. 7 Cal. 256. But see 1, *Heralol v. Datadin*, I. L. R. 4 All. 135 ; 2, *Golap Chand Marwari v. Thakurani Mohokoom Koori*, I. L. R. 3 Cal. 314.

As to insufficiently stamped *hundi*, see *Valliappa v. Mahommed Khasim*, I. L. R. 5 Mad. 166.

(c). The terms of a contract to repay a loan of money with interest, having been settled and the money paid, a promissory note specifying these terms, was executed later in the day by defendant and given to plaintiff. This promissory note was not stamped. In a suit brought to recover the unpaid balance of the loan on an oral contract to pay, *held*, that plaintiff could not recover—*Pothi Reddi v. Vetayuda Sivan*, I. L. R. 10 Mad. 94.

(d). Where accounts between a creditor and his debtor were stated, and the latter gave the former a bond for the balance found due by him to the creditor, *held*, that the creditor was precluded from subsequently suing on the accounts stated for the balance which had been found due—*Sirdar Kuar v. Chandrawati*, I. L. R. 4 All. 330.

(e). The plaintiff sued upon a document which was formed to be a promissory note and rejected as being unstamped. It was held that the document itself and secondary evidence of its contents being

*inadmissible*, no other evidence can be given to prove the terms of the contract between the parties of which the note was intended to be the evidence. (*Aukur Chunder Roy v. Madhav Churn Ghose*, 21 W. R. 1, followed). If the plaintiff had sought to prove the consideration by other evidence, as, for instance, by evidence as to an admission of the debt by the defendant, such evidence would have been admissible—*Damodar Juggunnath v. Atmaram Babaji*, I. L. R. 12 Bom. 443.

(f). In a suit on a bond, the Court held that the sum reserved was liquidated damages, not a penalty, and refused to allow the defendant to give evidence that the plaintiff had, subsequent to execution, stated that the claim was intended to operate as a penalty—*Beharyl Das v. Tejnarain*, I. L. R. 10 Cal. 765.

(g). A deed of partition was executed among three brothers, C, N and B, on the 19th March 1867, but was not registered. It recited that, some years previously to its date, a division of the family property, with the exception of three houses, had been effected, and it purported to divide these houses among the brothers. In a suit brought by C's widow for the recovery of the house which fell to C's share, held that, although the deed did not exclude secondary evidence of the partition of the family property previously divided, yet it affected, to dispose of the three houses by way of partition made on the day of its execution, and, therefore, secondary evidence of the contents were inadmissible under this section—*Kachubhai v. Gulab Chand*, I. L. R. 2 Bom. 635.

(h). The plaintiffs sued to recover damages for the non-acceptance of wheat which the defendant by two contracts agreed to purchase. At the hearing, in order to prove the terms of the contracts, the plaintiffs tendered two notes or memoranda of the contracts, which purported to be signed by the broker and also by the defendant. These notes were, in fact, the sold notes which the broker had given to the plaintiffs. These notes were held inadmissible, not being properly stamped. *Held*, that the terms of the contracts were reduced to writing, and by this section no evidence, except the documents themselves, could be given in proof of them—*S. A. Ralli v. Caramalli Fazal*, I. L. R. 14 Bom. 102.

**Criminal Cases.**—(a). In a case of giving false evidence, the English record written by the Magistrate was put in to prove what the accused had stated before him. The document was not interpreted to the accused in the language in which it was given, or which he understood; nor was it read over in accordance with the requirements of sec. 339, Cr. P. C., in the presence of the person then accused. Such

evidence was held inadmissible—*The Queen v. Mangal Das*, 23 W. R. (Cr.) 28.

(b). The deposition of a witness in a civil suit taken down in a language other than that in which the evidence was given is not admissible in evidence in a prosecution against him for perjury in respect of the statements made by him, unless the provisions of sections 132 and 183 of the Civil Procedure Code, Act X of 1877, have been complied with—*In re Mayadeb Gossami*, I. L. R. 6 Cal. 762.

(c). It is not obligatory upon a Police-officer to reduce to writing any statement made to him during an investigation. This section does not render oral evidence of such statements inadmissible—*Reg. v. Uttamchand Kapurchand*, 11 Bom. H. C. R. 120.

(d). A confession purporting to have been recorded under the provisions of section 164, Cr. P. C., was recorded by the Magistrate in English, though made in Hindi, which the Magistrate perfectly understood and could write. Such confession was held to be inadmissible in evidence, and no evidence of the Magistrate as to what the accused told him could be given, as the confession was matter which was required by law to be reduced to the form of a document; and, therefore, under this section, no evidence could be given in proof of such matter except the document, where, as in this case, it was in existence and forthcoming—*Jainaryan Rai v. The Queen-Empress*, I. L. R. 17 Cal. 862.

(e). A confession recorded under sec. 122 of the Code of Criminal Procedure (Act X of 1872) to be admissible in evidence must not only bear a memorandum that the Magistrate believed it to have been voluntarily made, but also a certificate, under sec. 346, that it was taken in the Magistrate's presence and hearing, and contains accurately the whole of the statement made by the accused person. No oral evidence can be received to prove the fact of confession, if the confession itself be inadmissible (*Reg. v. Bai Rutan*, 10 Bom. H. C. R. 166, followed)—*Reg. v. Shivya*, I. L. R. 1 Bom. 219.

92. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such

Exclusion of  
evidence of oral  
agreement.

instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms :

*Proviso (1).*—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto ; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law.

*Proviso (2).*—The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

*Proviso (3).*—The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

*Proviso (4).*—The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

*Proviso (5).*—Any usage or custom by which incidents not expressly mentioned in any contract

are usually annexed to contracts of that description, may be proved : Provided that the annexing of such incident would not be repugnant to, or inconsistent with the express terms of the contract.

*Proviso (6).*—Any fact may be proved which shows in what manner the language of a document is related to existing facts.

### *Illustrations.*

(a). A policy of insurance is effected on goods “in ships from Calcutta to London.” The goods are shipped in a particular ship which is lost. The fact that that particular ship was orally excepted from the policy, cannot be proved.

(b). A agrees absolutely in writing to pay B Rs. 1,000 on the first March 1873. The fact that, at the same time, an oral agreement was made that the money should not be paid till the thirty-first March, cannot be proved.

(c). An estate called ‘the Rámpur tea estate’ is sold by a deed which contains a map of the property sold. The fact that land not included in the map had always been regarded as part of the estate and was meant to pass by the deed, cannot be proved.

(d). A enters into a written contract with B to work certain mines, the property of B, upon certain terms. A was induced to do so by a misrepresentation of B’s as to their value. This fact may be proved.

(e). A institutes a suit against B for the specific performance of a contract, and also prays that the contract may be reformed as to one of its provisions, as that provision was inserted in it by mistake. A may prove that such a mistake was made as would by law entitle him to have the contract reformed.

(f). A orders goods of B by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery. B sues A for the price. A may show that the goods were supplied on credit for a term still unexpired.

(g). A sells B a horse and verbally warrants him sound. A gives B a paper in these words: 'Bought of A a horse for Rs. 500.' B may prove the verbal warranty.

(h). A hires lodgings of B, and gives B a card on which is written—'Rooms, Rs. 200 a month.' A may prove a verbal agreement that these terms were to include partial board.

A hires lodgings of B for a year, and a regularly stamped agreement, drawn up by an attorney, is made between them. It is silent on the subject of board. A may not prove that board was included in the terms verbally.

(i). A applies to B for a debt due to A by sending a receipt<sup>t</sup> for the money. B keeps the receipt and does not send the money. In a suit for the amount, A may prove this.

(j). A and B make a contract in writing to take effect upon the happening of a certain contingency. The writing is left with B, who sues A upon it. A may show the circumstances under which it was delivered.

*Vide* art. 90, Stephen's Digest.

**Reason of the Rule.**—This rule of the common law of England is "founded on the obvious inconvenience and injustice that would result, if matters in writing, made by advice, and on consideration, and intended finally to embody the entire agreement between the parties, were liable to be controlled by what Lord Coke expressively calls, 'the uncertain testimony of slippery memory.' When parties have deliberately put their mutual engagements into writing, in such language as imports a legal obligation, it is only reasonable to presume, that they have introduced into the written instrument every material term and circumstance; and, consequently, all parol testimony of conversations held between the parties, or of declarations made by either of them, whether before, or after, or at the time of, the completion of the contract, will be rejected; because such evidence, while deserving far less credit than the writing itself, would inevitably tend, in many instances, to substitute a new and different contract for the one really agreed upon, and would thus, without any corresponding benefit, work infinite mischief and wrong."\* Mr. Starkie says: "It is likewise a general and most inflexible rule that, wherever written instruments are appointed either by the requirements of the law, or by the compact of parties, to be the repositories and

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\* *Vide* Taylor, 6th Ed., sec. 1085.

memorials of truth, any other evidence is excluded from being used either as a substitute for such instruments or to contradict or alter them. This is a matter both of principle and policy: of *principle*, because such instruments are in their nature and origin entitled to a much higher degree of credit than parol evidence: of *policy*, because it would be attended with great mischief, if those instruments upon which men's rights depended were liable to be impeached by *loose collateral evidence*." The supposed reason of the rule assumes that in choosing the solemn form employed to express and embody their agreement, parties have intended thereby fully to express that agreement, removing it in this way from debatable questions, and beyond bad faith or the uncertain testimony of slippery memory. To admit parol evidence would, in the intendment of law, utterly defeat this object. The instrument therefore is conclusive as to the point which it covers. Mr. Story, in his Equity Jurisprudence, says: "The same general rule prevails in equity, as at law, that parol evidence is not admissible to contradict, qualify, extend, or vary written instruments; and that the interpretation of them must depend upon their own terms. But in cases of *accident, mistake, or fraud*, Courts of Equity are constantly in the habit of admitting parol evidence to qualify and correct, and even to defeat, the terms of written instruments."

**Extent of the Rule.**—Oral evidence to contradict, vary, add to or subtract from the terms of the writing, is excluded only as *between the parties to the instrument or their representatives in interest*. Other persons may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document (sec. 99 *post*). The Courts, in placing a construction upon it, must take care not to create a precedent, that would open the door to indiscriminate parol proof of transactions where written documents have recorded what has passed between the parties. But it should be remembered that if the instrument was not, in point of fact, intended fairly to represent the agreement of the parties, the rule stated above does not apply. The rule applies only, where, upon the face of it, the written instrument appears to contain the whole contract, and it seems that any evidence is admissible, which, as a matter of substantive law, may form, in law or equity, ground of relief against the operation of the instrument, though the effect, and indeed the object, of such evidence is to contradict such instrument.

**Required by law to be reduced to the form of a Document.**—The Transfer of Property Act, 1882, mentions numerous classes of contracts, which can be effected only by a document. In none of these cases could evidence of a subsequent oral contract modifying



the terms of the document be admitted. (*Vide* secs. 54, 59, 107, 123). A matter required by law, &c., to be reduced to the form of a document must, in order to be admissible, be so reduced in the form and manner prescribed.\*

**As between the parties to any such instrument.**—The words “between the parties to any such instrument” refer to the persons who on the one side and the other came together to make the contract or disposition of property, and would not apply to questions raised between the parties on the one side only of a deed, regarding their relations to each other under the contract. The words do not preclude one of two persons in whose favour a deed of sale purported to be executed, from proving by oral evidence in a suit by the one against the other, that the defendant was not a real but a nominal party only to the purchase, and that the plaintiff was solely entitled to the property to which it related, notwithstanding that the defendant was described in the sale-deed as one of the two purchasers—*Mulchand v. Madhuram*, I. L. R. 10 All. 421

**A man cannot both approbate and reprobate the same transaction.**—It is to be borne in mind that a party impugning a document can not affirm one part of the transaction and disaffirm the rest. The rules of evidence and the law of estoppel forbid any addition to, or variation from, deeds or written contracts. The law, however, furnishes exceptions to its own salutary protection; one of which is, when one party, for the advancement of justice, is permitted to remove the blind which hides the real transaction; as, for instance, in cases of fraud, illegality, and redemption, in such cases, the maxim applies that a man cannot both affirm and disaffirm the same transaction, show its true nature for its own relief, and insist on its apparent character to prejudice his adversary. This principle, so just and reasonable in itself, and often expressed in the terms that you cannot both approbate and reprobate the same transaction, has been applied by their Lordships of the Privy Council, to the consideration of Indian appeals, as one applicable in the Courts which are to administer justice according to equity and good conscience. The maxim is founded not so much on any positive law as on the broad and universally applicable principles of justice. See *Shah Makhun Lal v. Baboo Srikrishen Singh*, 12 M. I. A. 157; *Forbes v. Amirunnissa Begum*, 10 M. I. A. 356.

**Instances in which parol evidence was held inadmissible.**—(a). The defendant admitted the execution of a deed of sale, but alleged that contemporaneously with it he entered into an oral agreement

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\* *Vide* I. L. R., 6 Cal. 762.

with the vendee that the deed was to be merely a security for the payment of a certain sum of money by the defendant to the vendee, and that a large portion of the sum so secured had already been paid to the vendee. *Held*, that as the alleged agreement was wholly inconsistent with the terms of the deed of sale, evidence to prove such agreement was excluded by this section—*Banapa v. Tundar-das*, I. L. R. 1 Bom. 333.

(b). In a suit upon a kistibundi bond, the defendants pleaded that the debt had been liquidated from the usufruct of certain property which, by an oral agreement entered into at the time of the execution of the bond, had been assigned by them to the plaintiffs for that purpose. The High Court held that the allegation of the defendants amounted merely to a plea of payment, and that this section was not a bar to an inquiry as to the foundation of such a plea—*Govind Proshad Roy Chowdhary v. Anunda Chundra Chowdhary*, 4 C. L. R. 274.

(c). When an oral agreement is not a purely collateral or additional agreement, but constitutes an addition to the terms of a contract that had been reduced into writing, and is inconsistent with those terms, this section would exclude evidence of such agreement—*Cowasji Ruttonji Limboowalla v. Burjorji Rustomji Limboowalla*, I. L. R. 12 Bom. 33.

(d). In a suit brought by the plaintiffs to recover damages for breach of contract (bought and sold notes formed the contract and corresponded with the other), the defendants sought to show by oral evidence that the contract was for delivery of 750 *maunds*, if one-fourth of each of the successive arrivals should, in the aggregate, amount to 750 *maunds*. *Held*, that such evidence was inadmissible under this section, and that the plaintiffs were entitled to recover—*Jadu Rai v. Bhabataran Nandy*, I. L. R. 17 Cal. 173.

(e). In *Abrey v. Cruz*, L. R. 5 C. P. 37, to an action by the payee against the drawer of a bill of exchange, payable twelve months after date, the defendant pleaded that he drew the bill and delivered it to the plaintiff for the accommodation of the acceptor and as surety for him; that, at the time the defendant so drew and delivered the bill to the plaintiff, it was agreed between the plaintiff and defendant and the acceptor that the acceptor should deposit with the plaintiff certain securities, to be held by the plaintiff as security for the due payment of the bill, and that, in case the bill should not be duly paid, the plaintiff should sell the securities and apply the proceeds in liquidation of the bill, and that, until the plaintiff should have so sold the securities, the defendant should not be liable to be sued

on the bill. The plea then went on to aver that the securities were deposited with the plaintiff by the acceptor, but that the plaintiff had not sold but still held them. It was held, that oral evidence of the agreement alleged in the plea was not admissible, inasmuch as it contradicted or varied the express written contract on the face of the bill.

<sup>1</sup> (f). In *Hill v. Wilson*, L. R. 8 Ch. 888, A, being sued on a promissory note, set up this story, that his wife's uncle, having lent him £500, and intending to give it to him, at his death, he meanwhile to pay interest, the promissory note was drawn, to effect this object and was not intended to be enforced. This evidence was held to be inadmissible.

(g). The acceptor of a bill of exchange cannot set up a parol contract inconsistent with the contract on the face of the bill, and he cannot show that a bill was given by way of security for the repayment of a debt which was agreed to be paid in instalments—*Besant v. Cross*, 20 L. J. C. P. 173.

(h). Where a bond conditioned for payment absolutely, the defendant will not be allowed to show that there was an agreement, that the bond should operate merely as an indemnity: nor, when a note was, on the face of it, payable on a certain day, to show an oral agreement that it should be payable on a contingency, or that it should not be paid but be renewed. And so, where a promissory note is in its terms joint, one of the parties cannot show that he is a surety only; nor, when a person has signed as principal, can he show he was merely an agent."—*Cung. Ev.*, 251.

(i). Where a written instrument provided for a joint tenancy and joint-contract by all the parties executing it to pay the whole rent of the village without any reference to the quantity of land held by each, it was held that oral evidence was not admissible to show separate specific contracts imposing a several liability on each according to the amount of land held by him: and that it made no difference that the evidence was put forward as evidence of a custom—*Morris v. Panchanand Pillay*, 5 Mad. H. C. R. 135.

(j). Where A contracted to deliver B 2,000 maunds of fresh, clean and good up-country indigo, guaranteed growth of season 1870-71, A was not allowed to prove a custom of mixing seeds of two crops so as to bring up the sample to an average quality, as this would be distinctly at variance with the terms of the contract—*Macfarlane v. Carr*, 8 B. L. R. 459.

(k). In an action against the drawer of a bill of exchange, drawn and endorsed in England, and payable abroad and dishonoured,

evidence is not admissible to prove a usage among merchants in England to entitle the holder, at his option, to demand from the drawer the amount of re-exchange, or the sum which he gave for the purchase of the bill; this being a usage which in terms contradicts the written instruments—*Suss v. Pompe*, 30 L. J. C. P. 75.

**Instances in which parol evidence was held admissible.**—(a). If a debtor, after adjustment of accounts, executes a bond, he may, in a suit on the bond, be allowed to re-open the question of the correctness of the balance, if his case be that he discovered the errors in the account on which the balance was arrived at, after the execution of the bond—*Narayan Undir Dapel v. Matilal Ramdas*, I. L. R. 1 Bom. 45.

(b). In the above case it was also held that notwithstanding stipulations in the bond that payments should be endorsed on the back of the bond or receipts taken for the same, oral evidence of payment may be given, though the absence of endorsements is a circumstance of some importance, which ought not to be overlooked in estimating the value of such oral evidence.

(c). Where money has been advanced on a joint and several promissory note, one of the makers of which is merely surety for the other, and this fact is known to the lender; in such case the surety, notwithstanding the form of the note, may plead as an equitable defence that he was known to the lender to be surety when the note was made, and that without his consent time has been given by the lender to the principal debtor.—Taylor.

(d). Where bills of exchange were drawn against goods sold, and the bill of lading deposited as security that the bills of exchange should be duly met: on the bills being dishonoured, the holders sold the goods, and claimed against the defendants' estate the whole amount recoverable on the bills of exchange. Evidence was admitted to show the circumstances under which the bills were given, and that the holders were entitled to claim only the balance due after sale of the goods—*In re Shib Chundra Mullick*, 8 B. L. R. 30.

**Proviso (1).**—(a). *Purport of Proviso (1).*—Foremost among the exceptions to the rule rejecting parol evidence to affect written instruments come those cases where it is sought to impeach such instruments as having been obtained by fraud, intimidation, illegality, or where such documents are liable to be invalidated by proof of want of due execution, want of capacity in any contracting party, want or failure of consideration, of mistake in fact or law. The substance of this proviso and the examples (i.e., ill.

d, e and f) showing the meaning of it, are contained and explained in Taylor's Evidence. To reject parol or other extrinsic proof in such cases would be to apply the rule in question to a purpose for which it was never intended, and to render it a protection to practices which the object of the law is to suppress. This proviso is applicable only to cases where evidence is admitted to show that a contract is void or voidable, or subject to reformation upon the ground of fraud, duress, illegality, &c., in its inception, and not to cases where the agreement being in itself perfectly valid and free from taint of that kind, one of the parties attempts to make a fraudulent use of it as against the other.\*

**Any fact which would invalidate any Document.**—(a). The English law allows evidence to be given in variance of the terms of a contract to show that though no illegality is apparent on the face of it, the transaction was really unlawful and the agreement consequently void. A party may be precluded from setting up his own fraud, but a defendant, sued on a bond, may plead that it was given by him for an illegal and corrupt consideration. *Vide Collins v. Blintern*, 1 S. L. C. 369 (7th Ed.). The Indian law is in accordance with the English law on the point.

(b). In an action on a contract for the purchase and sale of goods on a certain day the defendant pleaded that the contract was a wagering contract; that the parties never intended to give or take delivery of the cotton; and that the contract was, therefore, void. *Held*, that oral evidence was admissible to prove the defence set up by the defendant—*Anupchand Hemchand v. Chimpai Ugerchand*, I. L. R. 12 Bom. 585. This case relied upon (1) *Doe dem Chandler v. Ford*, 3 Ad. and Ell. 649; (2) *Grizewood v. Blane*, 11 C. B. 528; (3) *Thacker v. Hardy*, 4 Q. B. Div. 683; (4) *Muganbhai Hemchand v. Manchhabhai Kallimchand*, 3 Bom. H. C. R. 79 O. C. J. Their Lordships, who decided this case, remarked that “it is true that such a transaction is not declared by the Act to be illegal, but the existence of such ‘understanding’ between the parties, or, in other words, of such an intention on their part, is a fact within the interpretation clause of the Evidence Act, illustration (d); and as it would invalidate the contract by making it ‘null and void,’ might be proved under sec. 92, proviso (1) of the Act, which provides that any fact (as interpreted by sec. 3) may be proved, which would invalidate the document.” The case of *Juggernath Shew Bux v. Ram Dyal*, I. L. R. 9 Cal. 791 was dissented from.

(c). In the case of *Eshoor Dass v. Venkatasubba Rau*, I. L. R. 17 Mad. 480, it was held that oral evidence is admissible to show that

\* *G. M. Cutts v. F. F. Brown*, I. L. R. 6 Cal. 328.

an agreement in writing to sell is really only an agreement by way of wager. Their Lordships dissented from *Juggernath Shew Bux v. Ram Dyal*, I. L. R. 9 Cal. 791.

**Admissibility of Oral Evidence to prove apparent Sale to be Mortgage.** *Vide* p. 286.

(a). Where a party alleges that a transaction is a sale and the other contends that it is a mortgage, it has been held that oral evidence is admissible to prove that the real transaction was a mortgage. It has been so decided on the principle that the Courts will not allow a rule or even a statute, which was introduced with a view to suppressing fraud, to be used as a weapon or means of effecting a fraud. It seems that this section does not render evidence of oral agreement inadmissible on the ground that if the real agreement were proved, it would invalidate the document as a deed of absolute sale within the meaning of the first proviso and constitute a ground for a Court of Equity and good conscience giving effect to it only as a mortgage. Refer to (1) *Govind v. Jeshapremaji*, I. L. R. 7 Bom. 73 ; (2) *Mahadaji Gopal Baklekar v. Vithal Ballal*, I. L. R. 7 Bom. 78 ; (3) *Baksu Lakshman v. Govinda Kanji*, I. L. R. 4 Bom. 594 ; (4) *Hem Chunder Soor v. Kally Charn Dass*, I. L. R. 9 Cal. 528 ; (5) *Kashinath Dass v. Harrihur Mookerji*, I. L. R. 9 Cal. 898 ; (6) *Williams v. Owen*, 5 My. and Cr. 303 ; (7) *Rakken v. Allagappudayan*, I. L. R. 16 Mad. 80 ; (8) *Lincoln v. Wright*, 4 De G. and Jones 16. *Vide* also the case of *Kashinath Chatterji v. Chundi Charn Banerji*, 5 W. R. (F. B.) 68. It seems that this section lays down in terms the same rule as Sir Barnes Peacock, in the last mentioned case stated to be the law, and the principle upon which the judgment in the Full Bench case proceeded is one which has constantly been acted upon by Courts of Equity in England as well as by the Courts of this country.

(b). In the case of *Kashinath Dass v. Harrihur Mookerji*, I. L. R. 9 Cal. 898, *Cunningham and Maclean JJ.* observed: "The point raised in this appeal is that the Court below was in error in holding that the defendant was not entitled to plead, nor was the evidence tendered by him admissible to show that the document mentioned in the plaint as a deed of purchase was only a security for money. There has been some wavering of opinion at different periods among the Courts in this country, as to the law of evidence on this point. The law for some period was laid down, so far as concerned this Court, by the Full Bench Ruling *Kashinath Chatterji v. Chundi Charn Banerji*, 5 W. R. 68, in which it was held that though evidence of a contemporaneous oral agreement was inadmissible to show that a document purporting to be an absolute conveyance was only a

mortgage, yet that evidence might be given of the facts of the case and of the subsequent conduct of the parties in order to show that this was the case. After the passing of the Evidence Act, it was held by some learned Judges of this Court that the Full Bench Ruling was no longer a correct exposition of the law.\* That view, however, was called in question in a decision of the Bombay High Court, reported in I. L. R. 4 Bom. 594 (*Baksu Lukman v. Govida Kanji*), in which case the learned Judges held with reference to the doctrine prevalent in the English Courts as to fraud, that on this ground it was open to the parties to a document and those who claimed under them to show by subsequent conduct and by various circumstances of the case that the document was not a conveyance, but was a mortgage. This view has, subsequently, been accepted by the Chief Justice of this Court and *Mr. Justice Mitter* in Letters Patent Appeal No. 1953 of 1881, in which case the Chief Justice laid down the same doctrine as was affirmed in the Full Bench Ruling in 5 W. R., as being still the correct exposition of the law, and in which he expressed his general concurrence in the views of the Bombay High Court, reported in 4 Bom. 594. We think, therefore, that the decision of the Court below in this case must be set aside, that it does not necessarily follow from sec. 92 of the Indian Evidence Act that subsequent conduct and surrounding circumstances may not be given in evidence for the purpose of showing that what on the face of it is a conveyance is really a mortgage. In applying this doctrine, however, it must be recollected that the rule turns on the fraud which is involved in the conduct of the person who is really a mortgagee who sets himself up as an absolute purchaser, and that the rule of admitting evidence for the purpose of defeating this fraud would not apply to an innocent purchaser without notice of the existence of the mortgage, who merely bought from a person who was in possession of the title deeds and was the ostensible owner of the property."

(c). In the case of *Lincoln v. Wright*, 4 De G. & J. 16, Lord Justice Turner remarked: "The principle of this Court is that the statute of Frauds was not made to cover fraud. If the real agreement in this case was that, as between the plaintiff and Wright, the transaction should be a mortgage, it is in the eye of this Court a fraud to insist on the conveyance as being absolute, and parol evidence must be admissible to prove the fraud. Assuming the agreement proved, the principle of the old cases as to mortgages seems to me to be directly applicable. Here is an absolute conveyance

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\* *Vide Diamuddee Paik v. Kaim Faridar*, I. L. R. 5 Cal. 300.  
*Ramdayal Bajpai v. Hiralal Lal Panday*, 8 C. L. R. 386.

when it was agreed that there should be a mortgage and the conveyance is insisted on in fraud of the agreement. The question then, as I view it, is whether there was such an agreement as this bill alleges, and, upon the evidence, I am perfectly satisfied that there was. Besides, the agreement for the mortgage was only part of an entire transaction, and the appellant cannot, as I conceive, adopt one part of the transaction and repudiate the other."

(d). In the case of *Rakken v. Alagappudayan*, I. L. R. 16 Mad. 80, Muttusami Ayyar J., after quoting the remarks of Lord Justice Turner, said: "Thus the *ratio decidendi* was that the conveyance formed only part of the real agreement, and that the oral agreement which gave a claim to equitable relief formed another part of the same transaction. Again, the ground for departing from the ordinary rule of evidence was subsequent unconscionable conduct in taking advantage of that rule and thereby endeavouring to mislead the Court into the belief that what was only an apparent sale, but a real mortgage was a real sale and not a mortgage. The fraud referred to by the Lord Justice was not fraud practised at the time when the document was executed, but the advancement of a claim in fraud of the true intention or the real agreement of the parties. It seems to me that sec. 92 of the Evidence Act, as observed in *Venkataratnam v. Reddiah*, I. L. R. 13 Mad. 495, does not render evidence of the oral agreement inadmissible, for, if the real agreement were proved, it would invalidate the document as a deed of absolute sale within the meaning of the 1st proviso of sec. 92 of the Evidence Act, and constitute a ground for a Court of Equity and good conscience giving effect to it only as a mortgage. Nor do I see my way to adopting the rule that a party should not first start his case with proof of a contemporaneous oral agreement, and then confirm it by evidence of subsequent acts and conduct of the parties, but that he should prove the latter first and then proceed to prove the former. The subsequent acts and conduct are only indications of the contemporaneous oral agreement, and it is such agreement that is the real ground of equitable relief. Such rule involves in it an anomaly that, while indirect evidence of the true agreement is admissible, notwithstanding sec. 92, direct evidence of the same is not admissible.

(e). In the case of *Venkataratnam v. Reddiah*, I. L. R. 13 Mad. 494, it was held that the plaintiff in that suit was entitled to show by collateral evidence that the sale deed was really a usufructuary mortgage, and that the mortgage had expired.

**Fraud.**—(a). The fraud referred to in this proviso must be contemporaneous fraud. *Vide Banapa v. Sundardas Jagjiandas*, I. L. R. 1 Bom. 338; *Cutts v. Brown*, I. L. R. 6 Cal. 328.



*As to fraud* refer to sec. 17, read along with sections 14 and 19 of The Indian Contract Act ; section 48 of The Indian Succession Act, X of 1865.

(b). It is a well known principle of law that no Court of Justice will lend its aid to further fraud, therefore it has been laid down that although mere verbal evidence is inadmissible to contradict a written contract, yet the Court should look to the surrounding circumstances and the acts and conduct of the parties in order to ascertain whether a document is really what it appears to be on the face of it. *Vide* remarks of *Melville J.*, in *Baksee Lackmun v. Govind Kanji*, I. L. R. 4 Bom. 594.

(c). In the case of *Kashinath Chuckerbutti v. Brindabun Chuckerbutti*, I. L. R. 10 Cal. 649, a defendant was allowed to show that a kabuliati had been fraudulently executed with a view to enabling the plaintiff to obtain a higher price for the land, and that there had never been any intention that defendant should be held liable under the kabuliati.

**Consideration.**—(a). The acceptor of a bill of exchange may show that he never had any consideration for the bill and that he accepted it for the accommodation of the drawer or some other party, although a bill *prima facie* imports consideration, and the acceptor is the party primarily liable—*M. Pogose v. The Bank of Bengal*, I. L. R. 3 Cal. 174. See sec. 25 of The Indian Contract Act, ill. (i).

(b). The provisions of this section do not prohibit the disproof of a recital in a contract as to the consideration that has passed by showing that the actual consideration was something different to that alleged—*Vasudeba v. Narasamma*, I. L. R. 5 Mad. 6.

(c). The plaintiff in a suit on a promissory note written on unstamped paper is not debarred from giving independent evidence of consideration—*Golap Chand Marwari v. Thakurain Mohokoom Koari*, I. L. R. 3 Cal. 314.

(d). This section does not prevent a party to a contract from showing that there was no consideration or that the consideration was different from that described in the contract. Where, therefore, a deed of sale described the consideration to be Rs. 100 in ready cash received, but the evidence showed that the consideration was an old bond for Rs. 63-5-0 and Rs. 36-4-0 in cash. *Held*, that there was no real variance between the statement in the deed and the evidence as to consideration having regard to the fact that it is customary in India, when a bond is given wholly or partially in consideration of an existing debt, to describe the consideration as being ready money received—*Hukumchand v. Hiralal*, I. L. R. 3 Bom. 159.

**Intimidation.**—See sec. 15 of The Indian Contract Act and sec. 48 of The Indian Succession Act.

“An imprisonment is not deemed sufficient duress to avoid a contract obtained through the medium of its coercion, if the party was in proper custody under the regular process of a Court of competent jurisdiction.”—Broom.

**Illegality.**—See secs. 23 and 24 of The Indian Contract Act; sec. 114 of The Indian Succession Act; and sec. 43 of The Indian Penal Code.

A contract to carry on litigation against a third party, with the express declaration that it was out of spite and ill-feeling against such third party, is against public policy, and, as such, cannot be enforced—*Bamondas Banerji v. Hurrolol Saha*, 10 W. R. 140.

**Want of Capacity.**—See secs. 11 and 12 of The Indian Contract Act.

**Mistake.**—As to cases in which a Court of Equity will allow mistake to be shown without reforming the agreement, see Sugden's Vendors and Purchasers, 10th Ed., p. 224.

As to the circumstances under which mistake, fraud, &c., in a contracting party, or want of consideration will avoid a contract, see Contract Act, secs. 20—22.

(a). Parol evidence is admissible to show that certain words in a contract must, from the circumstances of the case, have been inserted by mistake. *Vide Freeman v. Raul*, 12 W. R. 532.

(b). Where a party had specially stipulated that he was acting as agent for another, and had signed as such agent for his absent principal named, he was at liberty to show, by way of equitable defence, that the agreement, which had been drawn up in such terms as to make him personally liable, was so written by mistake and did not express the real contract—*Wake v. Harrop*, 30 J. J. Ex. (N. S.) 273.

(c). In an action against a surety, it was allowed to be pleaded that the agreement by which it was alleged that the principal debtor was released, was worded by mistake so as to include the present claim, and that the plaintiff did not otherwise discharge the debtor, and that the true agreement was, in all respects, performed—*Vosley v. Barrett*, 26 L. J. C. P. 1.

(d). The mistake must be pleaded within a reasonable time, 1 Mad. H. R. 320.

**Proviso (2).**—This proviso is in conformity to the course of decisions in England, according to which this rule of exclusion applies, not only

to records, deeds, wills and other documents required by law to be in writing, but also to every document which contains the terms of a contract between two parties and is designed to be the evidence of their final intentions. The principal ground on which, in the cases mentioned in this proviso, evidence of a separate oral agreement is made admissible is that the written agreement did not and was not intended to include the entire contract. Oral evidence should therefore be confined to those parts only for which the document does not provide. The intention of the parties that the writing should not contain the whole agreement between them may be shown by direct evidence, or inferred from the informality of the document. It is therefore necessary to consider—*1st*, whether the matter upon which oral evidence is tendered is one about which the document is silent; *2nd*, whether the alleged contemporaneous agreement is inconsistent with the provisions contained in the document; *3rd*, whether the formality of the document renders it improbable or its informality renders it probable that the parties did not intend to express the whole of their intentions in it.

*Vide* illa. (f), (g) and (h).

(a). A deed of *putowa* contained a recital of the payment of the sum of Rs. 2,000 as bonus to the plaintiff by the defendant, the mode of payment being stated to be in cash in one lump sum. The plaintiff sued to recover the sum of Rs. 1,850, alleging that only Rs. 150 had been paid and not Rs. 2,000 as recited in the *putowa*. The defendant admitted that Rs. 850 was due, and as to the remaining Rs. 1,000 alleged that, at the time of the transaction, it was agreed that the sum of Rs. 1,000 was to be retained by him on account of a debt due by one of the plaintiff's relation to him. The plaintiff objected that the evidence to the agreement set up by the defendant was inadmissible. *Held*, that inasmuch as it was open to the plaintiff under proviso (1), to prove by oral evidence that the whole of the consideration-money had not been paid, it was equally competent to the defendant, in answer to such case, to adduce evidence to prove the true nature of the contract, and that the consideration was different from that stated in the contract; and that the plea of the defendant substantially was that, although the consideration was fixed at Rs. 2,000, there was a separate oral agreement to the effect that out of that sum the plaintiff was to refund Rs. 1,000 on account of the debt due from his relative, and that on this ground the oral evidence tendered was admissible under proviso (2), the stipulation as to the refund of the Rs. 1,000 not being inconsistent with the recital as to the consideration in the contract—*Lala Himmat Sahai Shingh v. Llewellyn*, I. L. R. 11 Cal. 486.

(b). Plaintiff having sued for arrears of rent payable under a kabuliat in respect of a share of four villages, the defendant pleaded that he had been put in possession of one only of the four, leased to him, and that therefore he was not liable to the whole claim. Parol evidence was admitted under provisos (2) and (3) of this section, to show that at the time the kabuliat was granted it had been agreed between the plaintiff and defendant, the title of the former being under dispute, that the whole rent payable under the kabuliat should be payable in respect of such of the villages, as should actually come into defendant's possession. The deed contained no express stipulation in regard to which evidence was sought to be adduced—*Ramkishore Lal v. Nand Ram*, 4 C. L. R. 100.

(c). In a suit upon a hatchitta, the Court, having regard to the informal nature of the document sued upon, allowed evidence to be given of a verbal agreement to repay the amount acknowledged with interest, no mention having been made as to interest in the hatchitta itself—*Umesh Chunder Baneya v. Mohini Mohun Das*, 9 C. L. R. 301.

(d). Where a promissory note is silent as to interest, a verbal agreement made subsequent to the execution of the note to pay interest may be proved under cl. 2 of this section—*Sowdamonee Debya v. A. Spalding*, 12 C. L. R. 163.

(e). In defence to a suit upon a hypothecation bond payable by instalments, it was pleaded that, at the time of the execution of the bond, it was orally agreed that the obligee should, in lieu of instalments, have possession of part of the hypothecated property, until the amount due on the bond should have been liquidated from the rents; that in accordance with this agreement, the plaintiff obtained possession of the land; and that he had thus realised the whole of the amount due. *Held*, that the oral agreement was not one which detracted from, added to, or varied the original contract, but only provided for the means by which the instalments were to be paid, and that it was therefore admissible in evidence—*Rambuksh v. Durjan*, 1. L. R. 9 All. 392.

(f). In a deed of mortgage, executed on behalf of a minor by his guardian in favour of T (who did not execute it), it was recited that the mortgage was made to secure the repayment of a certain sum which T had undertaken to expend in liquidating certain debts due by the minor's estate, and amongst others a debt due to K. T having failed to pay this debt, K obtained a decree against, and was paid by, the minor's guardian. In a suit brought on behalf of the minor against T to recover the amount paid in satisfaction of K's decree, T pleaded that it had been orally agreed at the time of

the mortgage that he was to obtain an indemnity either from K or from the minor's guardian before payment, in case the minor repudiated the debt on coming of age. *Held*, that evidence of such oral agreement was admissible under this section—*Tiruvengada Ayyangar v. Rangasami Naiyak*, 1. L. R. 7 Mad. 19.

(g). Where a charter party was dated 6th February and contained a covenant that a ship should sail on 12th February, evidence was admitted to show that in fact the charter party was not signed till 15th March, and that, consequently, the stipulation as to the ship sailing on 12th February, could have formed no part of the contract—*Hall v. Cazenooe*, 4 East. 477.

(h). In a case, where the plaintiff had lent money to defendant and there was an entry in plaintiff's book of the amount of the loan and the date, but not as to date of repayment, evidence was held to be admissible of a contemporaneous oral agreement as to the time of repayment—*Behary Lol Dey v. Kamini Soondari*, 14 W. R. 319.

(i). In *Morgan v. Griffith*, L. R. 6 Ex. 70, the plaintiff had agreed to hire certain grass land of the defendant and had refused to sign the lease unless the defendant would promise to destroy the rabbits. The defendant refused to put a term to this effect in the lease, but promised orally to destroy them. It was held that the oral agreement was collateral to the lease and that evidence of it was properly admitted. See also *Angell v. Duke*, L. R. 10 Q. B. 174.

**Proviso (3).**—It is an extension of proviso (2). It introduces into the Law of Evidence the rule which is well established and understood in England, and is treated of in section 1083 of Taylor on Evidence. That rule is that when, at the time of a written contract being entered into, it is orally agreed between the parties that the written agreement shall not be of any force or validity until some condition precedent has been performed, parol evidence of such oral agreement is admissible to show that the condition has not been performed, and consequently that the written contract has not become binding (6 Cal. 433). Thus "It may be proved by oral evidence that an instrument, apparently executed as a deed, had really been delivered simply as an escrow, or that a document, signed as an agreement, had not been intended by the parties to operate as a present contract, but that it was meant to be conditional on the happening of an event, which had never occurred."—Taylor, sec. 1038. This rule can never apply to a case where the written agreement has not only become binding, but has actually been performed as to a large portion of its obligation.

**Condition precedent to the attaching of any obligation.**—This expression means a 'condition precedent to some particular obligation

contained in the contract being of force or validity,' as, e.g., a provision that certain instalments should not be paid till a certain debt has been paid. Till the condition was performed, there was, in fact, no contract at all; but where the contract had in fact become binding and had in part been performed, it was not permissible to show that some particular provision in the written contract was subject to an oral condition precedent—*Jaganand Misser v. Negham Singh*, I. L. R. 6 Cal. 435.

**Obligation.**—The true meaning of the words "any obligation" in this proviso is any obligation whatever under the contract, and not some particular obligation which the contract may contain—*Jaganand Misser v. Negham Singh*, I. L. R. 6 Cal. 433.

(a). Where, at the time of the execution of a written contract, it is orally agreed between the parties that the written agreement shall not be of any force until some condition precedent has been performed, the rule that parol evidence of such oral agreement is admissible to show that the condition has not been performed, and consequently that the contract has not become binding, cannot apply to a case where the written agreement had not only become binding, but had actually been performed as to a large portion of its obligations, I. L. R. 6 Cal. 433.

**Escrow.**—An escrow is a writing deposited that a third person to be by him delivered to the person whom it purports to benefit upon the performance of some condition, upon which only the writing is to have effect.

(a). Oral evidence is admissible in order to show the moment at which a document becomes a contract. *Vide Stewart v. Eddoneer*, L. R. 9 C. P. 311.

**Proviso (4).**—It points out that a written contract may be modified or rescinded by a subsequent oral contract, except in cases where the contract is required by law to be in writing or has been registered. It is in reality no exception to the rule laid down in the section.

(a). D sold a house to P, and executed a deed of conveyance which was duly registered. The purchase-money, however, was never paid by P, who, consequently, never obtained possession. Shortly after the conveyance had been registered, P returned it to D with an endorsement thereon to the effect that it was because P was unable to pay the purchase-money. The right, title, and interest of P in the house was subsequently attached and sold under a decree obtained against him by the plaintiff. The plaintiff became the purchaser, and sued D for possession. The lower Courts threw out the claim, on the ground that the property had not passed to P, the sale to him

being incomplete. *Held* (1) 'The sale of the house by D to P was not incomplete. The deed purported to make an immediate transfer of the ownership of the house to P, and P accordingly became the owner of the house. (2) The conveyance by D to P having been registered, no oral agreement to rescind it could be proved under this section, proviso (4)—*Umedmal Motiram v. Dabu bin Dhondiba*, I. L. R. 2 Bom. 547.

(b). Where the defendant claimed the property as a preferential heir, and also set up an alternative defence of an alleged oral agreement cancelling a registered deed of sale of property by her co-widow to the plaintiffs, it was held that the object of the oral agreement was not to rescind the original transaction, but to transfer any rights, acquired by the plaintiffs, to the defendant, and was an entirely new transaction, and this section was no bar to any inquiry into the merits of this defence—*Rakhabai v. Tukaram*, I. L. R. 11 Bom. 47.

(c). The plaintiff sought to attach a certain *hak* as belonging to his judgment-debtor K. The defendant, who was the original grantor of the *hak*, pleaded a re-grant of the *hak* to himself. In support of this plea, the defendant produced from his possession the original *sanad* bearing the following endorsement by K. "You have passed me a receipt for the *sanad*. I have, accordingly, given you the ownership of the *sanad*. Therefore, over the said *sanad*, I have no right or title." The defendant offered to put in this endorsement, and also tendered the evidence of K's brother. This evidence was rejected by the Court, on the ground that the endorsement, which had the effect of extinguishing the grant, was not registered. *Held*, that the alleged re-grant was a transaction entirely distinct from the original re-grant, and, therefore, not one falling under proviso (4) to this section. The defendant was at liberty to adduce evidence to prove this transaction—*Herambadeb Dharnidhardeb v. Kashinath Bhaskar*, I. L. R. 14 Bom. 472.

(d). Subsequent to the execution and registration of a bond, a *jamog* or novation was made orally between the creditor and the debtor by which the former agreed to take the rents of certain tenants of the latter in satisfaction of interest, the latter agreed to release the tenants from payment of rent to himself, and the tenants (who were parties to the agreement) agreed to pay their rents to the creditor. In a suit brought by the creditor against the debtor, it was held that the *jamog* was not a subsequent oral agreement rescinding or modifying a contract which was registered according to the law for the time being in force, within proviso (4) of this section—*Autu Singh v. Ajudhia Sahu*, I. L. R. 9 All. 249.

**Proviso (5).**—In a certain sense, every material incident which is added to a written contract, varies it, makes it different from what it appeared to be, and so far is inconsistent with it. If, by the side of the written contract *without*, you write the same contract *with* the added incident, the two would seem to import different obligations, and to be different contracts. To take a familiar instance by way of illustration : on the face of a bill of exchange at three months after date, the acceptor would be taken to bind himself to the payment precisely at the end of three months ; but by the custom, he is only bound to do so at the end of the days of grace, which vary according to the country in which the bill is made payable, from three up to fifteen. The truth is that the principle on which evidence is admissible under this proviso seems to be “that the parties have not set down on paper the whole of their contract in all its terms, but those only which were necessary to be determined in the particular case by specific agreement, and which, of course, might vary infinitely, leaving to implication and tacit understanding all those general and unvarying incidents which a uniform usage would annex, and according to which they must, in reason, be understood to contract unless they expressly exclude them. To fall within the exception, therefore, of repugnancy, the incident must be such as, *if expressed in the written contract*, would make it insensible or inconsistent.” *Vide* observations of Lord Campbell in *Humfrey v. Dale*, 7 E. and B. 266.

**Usage.**—Merchants and traders, with a multiplicity of transactions pressing on them, and moving in a narrow circle, and meeting each other daily, desire to write little and leave unwritten what they take for granted in every contract. In a vast majority of cases, of which the Courts of Law hear nothing, they do so without loss or inconvenience ; and upon the whole, they find this mode of dealing advantageous, even at the risk of occasional litigation. It is the business of Courts reasonably so to shape their rules of evidence as to make them suitable to the habits of mankind, and such as are not likely to exclude the actual facts of the dealings between parties when they are to determine on the controversies which grow out of them. It cannot be doubted, that oftentimes a contract is made with some usage or custom understood to be a term in it ; to exclude the usage or custom is to exclude a material term of the contract, and must lead to an unjust decision ; but it should be borne in mind that when a usage conflicts with the expressed intention of the document, the latter must be followed. The true and appropriate office of a usage or custom is to interpret the otherwise indeterminate intentions of parties, and



to ascertain the nature and extent of their contracts arising not from express stipulations, but from mere implications and presumptions and acts of a doubtful or equivocal character.

(a). In the case of *Hazari Mull Nahatta v. Sobagh Mull Duddha*, 9 B. L. R. 1, the drawers of a hundi in favor of plaintiff at Dacca, where all parties to the hundi lived, were not held liable, on proof that they were the gomastas of the acceptor, had no interest in the hundi, and that, according to the custom of Dacca, where the hundi was drawn and accepted, agents were not, under such circumstances, liable, though the agency does not appear on the hundi.

(b). As to the 'usage' which may be proved as adding an incident to a written contract, there needs not either the antiquity, the uniformity, or the notoriety of 'custom' which in respect of all these becomes a local law. The usage may be still in the course of growth; it may require evidence for its support in each case; but in the result it is enough if it appear to be so well known and acquiesced in, that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into the contract. *Vide Juggomohan Ghose v. Manick Chand*, 7 M. I. A. 263.

(c). The English Courts have held that, where there is a usage or custom of trade, the intention of the parties to exclude a contract from its operation must be shown by the contract itself, and cannot be proved by other evidence.

(d). In the case of *J. G. Smith v. Ludha Ghella Damodar*, 17 Bom. 129, it was held that evidence of a custom or usage of trade is not admissible to explain or vary the natural and ordinary meaning of the words in the contract. Such evidence is only receivable when the incident which it is sought to import into the contract is consistent with the terms of the written instrument. If inconsistent, the evidence is not receivable, and the inconsistency may be evinced (a) by the express terms of the written instrument, or (b) by implication therefrom. In *Hutton v. Warren* (1 M. and W. p. 474), Parker B. said: "It has been long settled that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has been applied to contracts in other transactions of life in which known usages have been established and prevailed: and this has been done upon the principle of presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages."

(c). In *Field v. Lolean*, 30 L. J. Ex. 168, the contract was "Bought—250 shares, at £2-5s. per share, £562-10s. for payment, half in two, half in four months;" it was held that parol evidence of a custom among dealers in such shares, that delivery should take place concurrently with payment, was admissible. This case overruled *Spartali v. Benecke*, 19 L. J. C. P. 293.

**Proviso (6).**—This proviso allows evidence to be given as to what did, as a fact, pass by a deed, the language of which is susceptible, with equal propriety, of two constructions. If parol evidence is tendered, for the purpose of ascertaining the subject-matter to which to apply the contract, such evidence would be admissible under this proviso. So, where delivery of goods or other performance is to take place within a "reasonable" time, evidence of the circumstances of the case is admissible to show what was 'reasonable.'

In regard to wills, the verbal and written declarations or statements made by a testator in and about the making of his will when accompanying acts done by him in relation to the same subject, are admissible as evidence of the contents of the will—*Johnson v. Lyford*, L. R. I. P. and D. 546.

(a). Every document must, to some extent, be interpreted by circumstances. However accurate and detailed a description of things and persons may be, oral evidence is always wanted to show that persons and things answering the description exist; and therefore in every case whatever, every fact must be allowed to be proved to which the document does or probably may refer—*St. Dig.* 186.

(b). *Vide Mayen v. Alston*, I. L. R. 16 Mad. 238.

(c). The obligors of a bond for the payment of money describing themselves as 'sons of R, zaminder and pattidar, resident of mouza S,' hypothecated as collateral security for such payment their one-biswa five-biswansi share. The deed did not distinctly show that the share of one-biswa five-biswansi hypothecated in the deed was a share to that amount in mouza S. *Held*, in a suit on the bond to enforce a charge on the one-biswa five-biswansi share of the obligors in mouza S, that under proviso (6), evidence might be given to show that the obligors hypothecated by the bond their share in mouza S—*Ramlol v. Harrison*, I. L. R. 2 All. 832.

(d). The question whether an unambiguous written contract for the sale and purchase of Government paper is a contract or agreement by way of wager must be decided on the expressed terms of the contract itself, and parol evidence is not admissible to vary or contradict those terms—*Juggernath Sew Bux v. Ram Doyal*, I. L. R. 9 Cal. 791.

93. When the language used in a document is, on its face, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.

Exclusion of evidence to explain or amend ambiguous document.

### *Illustrations.*

(a). A agrees, in writing, to sell a horse to B for 'Rs. 1,000 or Rs. 1,500.' Evidence cannot be given to show which price was to be given.

(b). A deed contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled.

**Scope of the Section.**—The present section is not intended to have the effect of excluding evidence to explain abbreviations, illegible words, obsolete or provincial expressions, &c., which may in one sense be said to be "ambiguous or defective language," as to which see section 98. It applies to cases (1) in which either no meaning at all has been expressed, the sentence having been left unfinished, as, *e.g.*, where there is a grant "of—to A" or a grant "of Blackacre to—"; or (2) where, though the language is intelligible, it is such as to give rise to an obvious uncertainty of meaning, as when, *e.g.*, a man contracts to sell "one of my horses" or a horse for Rs. 1,000 or Rs. 1,500." Here, as the language expresses no definite meaning, if evidence were allowed to be given as to what the intention of the person using it was, the effect would be, not to interpret words, but to conjecture as to intentions, and this the section forbids—Cung., 262-263.

**Ambiguity.**—The English law recognises two kinds of ambiguities—*Latent* and *Patent*. Section 94 deals with *patent* ambiguities; sections 95, 96 and 97 with *latent* ambiguities. The rule as to such ambiguities is laid down by Lord Bacon thus: "There be two sorts of ambiguities, the one is *ambiguitas patens*, and the other *latens*. *Patens* is that which appears to be ambiguous upon the deed or instrument: *latens* is that which seemeth certain and without ambiguity for anything which appeareth on the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity. *Ambiguitus patens* is never holden by averment, and the reason is because the law will not couple and mingle matter of speciality, which is of the higher account, with matter of averment, which is of inferior account in law; for that were to make all deeds

hollow and subject to averments, and so, in effect, to pass that without deed which the law appointeth shall not pass but by deed." If the Court, aided by evidence of all the material circumstances in the case, finds that the language of the instrument in question has failed sufficiently to identify the intention of the parties or the subject-matter of the document, the case is one of *patent* ambiguity. If, on the other hand, the Court, so aided, finds the language of the instrument *prima facie* clear and conclusive as to the intention of the parties, but that the evidence before it makes doubtful the identity of the thing referred to, the ambiguity is *latent*. If the ambiguity is *patent*, it is the duty of the Court to declare the instrument *pro tanto* inoperative and void; to hold otherwise would in effect be making a new instrument for the parties. If, on the other hand, the ambiguity be *latent*, and more especially and commonly if the case be one of equivocation, the ambiguity of language may be supplied by averment. "A written instrument is not ambiguous because an ignorant and uninformed person is unable to interpret it. It is ambiguous only if found to be of uncertain meaning, when persons of competent skill and information are unable to do so. Words cannot be ambiguous because they are unintelligible to a man who cannot read; nor can they be ambiguous merely because the Court which is called upon to explain them may be ignorant of a particular fact, art, or science which was familiar to the person who used the words, and a knowledge of which is therefore necessary to a right understanding of the words he has used..... Again, a distinction must be taken between *inaccuracy* and *ambiguity* of language. Language may be inaccurate without being *ambiguous*, and it may be *ambiguous* although perfectly accurate..... It is obvious, therefore, that the whole of that class of cases in which an inaccurate description is found to be sufficient merely by the rejection of words of surplusage, are cases in which no ambiguity really exists."\*

**When admissible.**—An agreement is not to be deemed unintelligible because of some error, omission or mistake in drawing it up, if the real nature of the mistake can be shown so as to make the bargain intelligible. Thus, in *Coles v. Holme*, a bond 'to pay 7770' was allowed to be amended by adding the word 'pounds,' the recital in the condition that that must have been the meaning of the parties—*Benj.*, 28.

Where documents are obscure and admit of more than one construction, but where both parties have long acted on the footing of a

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\* *Vide Wigram's Extrinsic Evl.*, 4th Ed., 200.

given practical construction, the Court, in the absence of better evidence, will accept that construction as correct—*Forbes v. Watt*, L. R. 2 Scotch Appeals 214.

**When inadmissible.**—(a). Where a bill of exchange purported, in the body of it, to be drawn for two hundred pounds, but the figures at the top were £245, and the stamp was for the larger amount, it was held that evidence of the intention of the parties to draw the bill for the larger amount was inadmissible, and that the sum mentioned in words in the body of the bill must be taken as that for which the bill was drawn—*Sanderson v. Piper*, 7 Scott 408.

(b). Where persons describing themselves as residents of J., gave a bond for the payment of money, in which, as collateral security, they charged their property generally in the following terms: "We hypothecate as security for the amount our property with all the rights and interests." It was contended that such agreement created a charge on the property. It was held that parol evidence to explain what was meant by 'our property' was to be excluded by this section—*Deojit v. Petambar*, I. L. R. 1 All. 275.

(c). In *Tucker v. Seaman's Aid Society*, 7 Meto. 188, a bequest was made to the 'Seaman's Aid Society.' Another society of similar objects, the 'Seaman's Friend Society,' offered evidence that the testator had never heard of the 'Seaman's Aid Society'; that on the contrary he was deeply interested in the objects of their society, to which he was a frequent contributor; that he had repeatedly expressed his determination to leave it a legacy, and that the scrivener had caused the insertion of the name of the other society by the statement that such was the proper 'style' of their society. *Held*, that such evidence was inadmissible, there being no *latent* ambiguity.

**Summary of the Law embodied in sections 93, 94, 95, 96 and 97.**—  
"From the preceding cases and observations, the following rules may be collected:—First, where, in a written instrument, the description of the person or thing intended is applicable with legal certainty to each of several subjects, extrinsic evidence, including proof of declarations of intention, is admissible to establish which of such subjects was intended by the author. Secondly, if the description of the person or thing be partly applicable and partly inapplicable to each of several subjects, though extrinsic evidence of the surrounding circumstances may be received for the purpose of ascertaining to which of such subjects the language applies, yet evidence of the author's declarations of intention will be inadmissible. Thirdly, if the description be partly correct and partly incorrect, and the correct part be sufficient of itself to enable the Court to identify

the subject intended, while the incorrect part is inapplicable to any subject, parol evidence will be admissible to the same extent as in the last case, and the instrument will be rendered operative by rejecting the erroneous statement. Fourthly, if the description be wholly inapplicable to the subject intended, or said to be intended by it, evidence cannot be received to prove whom or what the author really intended to describe. Fifthly, if the language of a written instrument, when interpreted according to its primary meaning, be insensible, with reference to extrinsic circumstances, collateral facts may be resorted to, in order to show that in some secondary sense of the words, and in one in which the author meant to use them, the instrument may have a full effect."—Taylor's Evi., 6th Ed., 1060, 1061.

94. When language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

Exclusion of evidence against application of document to existing facts.

### *Illustration.*

A sells to B, by deed, 'my estate at Rámpur containing 100 bighás.' A has an estate at Rámpur containing 100 bighás. Evidence may not be given of the fact that the estate meant to be sold was one situated at a different place and of a different size.

**Purport of the Section.**—Where the words used in a document are free from any ambiguity, and there is no doubt or difficulty as to the application of the words used, the document is to be construed according to the plain common meaning of the words, and no evidence is admissible for showing what the supposed intention of the parties might have been. It being ascertained as a preliminary question, that the written instrument fairly and fully represents the intent of the parties at the time of its execution, the duty of the Court becomes merely one of interpretation and construction of the language employed,—the object being to ascertain the expressed meaning of the parties. That meaning, once ascertained, is incontrovertible by any parol evidence; no new words can be added; the Court cannot, as is said, "travel out of the four corners of the paper." But evidence may be given to explain language, though apparently plain, when such language is really used in a technical or peculiar sense (see sec. 98).

(a). Extrinsic evidence is not admissible to alter a written contract or to show that its meaning is different from what its words import ; where there is a *latent* ambiguity in the wording parol evidence is admissible to explain it—*Ramlochan Shaha v. Unnopoorina Dassi*, 7 W. R. 144. *Vide* also—

1. *Rambuddun Singh v. Runi Sree Koonwar*, W. R. (1864), Act X, 22.
2. *Alguja Tirrachet v. Tambola Pillai*, Mad. R. A. C. 264.
3. *Madhoo Chand Roy v. Gungadhar Samant*, 11 W. R. 459 ; (but see 12 W. R. 532).

(b). A document is to be construed according to the plain common meaning of the words, and no extrinsic evidence, for the purpose of explaining the document according to the supposed intention of the parties, is admissible—*Shore v. Wilson*, 5 Scott N. R. 958.

Evidence as to document unmeaning in reference to existing facts.

95. When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense.

### *Illustration.*

A sells to B, by deed, 'my house in Calcutta.' A had no house in Calcutta, but it appears that he had a house at Howrah, of which B had been in possession since the execution of the deed. These facts may be proved to show that the deed related to the house at Howrah.

**Rule of Law.**—The rule is thus laid down in the English Courts : "As soon as there is an adequate and sufficient definition, with convenient certainty, of what is intended to pass by a deed, any subsequent erroneous addition will not vitiate it ;"\* consequently so much of the description as has no application may be discarded as mere surplusage. The rule laid down in this section is a case of *latent ambiguity*. Where the language of the document is not ambiguous, and an intelligent meaning can be given to it, reading the document by itself, but if reference be made to existing facts, the document becomes unmeaning, it is then and then only that the section allows evidence to be given to show that such language was used in a peculiar sense, and in such cases evidence of conduct of

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\* *Vide Llewellyn v. Earl of Jersey*, 11 M. and W. 188.

the executant of the document is of great value. (*Vide* notes to sec. 96 *post*). Where, under this and the following sections, evidence is admissible to explain a document, oral statements of the making of the document are admissible, and it matters not whether those statements are prior to, contemporaneous with, or subsequent to the making of the document.\*

**Instances of application of the Rule.**—(a). The obligors of a bond for the payment of money, describing themselves as “sons of R, zaminder and pattadar, resident of mouza S, hypothecated as collateral security for such payment their one-biswa five-biswansi share.” *Held*, in a suit on the bond to enforce a charge on the one-biswa five-biswansi share of the obligors in mouza S, that under this section and proviso (6) of sec. 92, evidence might be given to show that the obligors hypothecated by the bond their share in mouza S—*Ramlol v. Harrison*, I. L. R. 2 All. 832.

(b). Where there is a written agreement to deliver a quantity of grain at a particular time, evidence may be given to show what kind of grain the contracting parties had in their contemplation at the time the contract was made—*Valla bin Hatsiji v. Sidaji bin Randji*, 5 Bom. A. C. 87.

(c). A legacy given to Catharine Earnley was claimed by Gertrude Yardley, and awarded to her on its being shown that no such person as Catharine Earnley was known to the testator, that the testator was in the habit of calling the claimant Gatty, which might easily have been mistaken by the person who drew the Will for Katy, and on other evidence showing that Gertrude Yardley was the person really meant. *Vide* *Cung. Ev.*, 266.

**Misdescription in Sale Certificate.**—(a). Where lands claimed under a certificate of sale as being in one village are found to be in another, it is open to the plaintiff to show that there has been a misdescription, and that although the name of the former was used, the intention was to convey the lands he claimed situated in the latter—*Ram Gopal Barick v. Shib Persaud Sircar*, 12 W. R. 483.

(b) A mere verbal error in the proceedings connected with the attachment and sale of property in execution of a decree, if it introduces no doubt as to what the Court intended to deal with, is not such misdescription as will in any way defeat the auction-purchaser's rights—*Taranath Chuckerbutty v. Joy Sundari Dabi*, 21 W. R. 93.

(c). Where a sale certificate described *jotedari interests* what was really a *Shikmi taluk*, this misdirection was held not to prejudice the

\* *Vide* *Doe de Allen v. Allen*, 12 A. and E. 461.



purchaser's title—*Kalimadhar Darogah v. Ashruf Ali Khan*, 19 W. R. 276.

(d). Where the widow of a certain person, whose share in an estate had been sold in execution of a decree and purchased by the decree-holder, sought to guard the share from the effects of the sale by pleading *firstly*, that the sale certificate did not correctly describe the share in suit, and *secondly*, that her husband's share had been conveyed away to her at a period long anterior to the sale; and the lower Court ruled that the sale certificate was inoperative, partly because in permitting it to be inaccurately framed, the decree-holder may have intended to deal fraudulently, and partly because extraneous evidence of the sale could not be received. *Held*, by the High Court that, though the establishment of fraud on the part of the decree-holder would prevent his recovering anything, the existence of fraud in his dealings had not been found as a fact in this case and could not be assumed; and that where a sale certificate was accurate as to any part of the description of the subject of sale, and could be used to identify it, with the assistance of extraneous evidence, such evidence could be received under this section to show what was intended to be dealt with—*Musst. Maleeban v. Musst. Raseda*, 25 W. R. 401.

96. When the facts are such that the language used might have been meant to apply to any one, and could not have been meant to apply to more than one, of several persons or things, evidence may be given of facts which show which of those persons or things it was intended to apply to.

Evidence as to application of language which can apply to one only of several persons.

### *Illustrations.*

(a). A agrees to sell to B, for Rs. 1,000, 'my white horse.' A has two white horses. Evidence may be given of facts which show which of them was meant.

(b). A agrees to accompany B to Haidarabad. Evidence may be given of facts showing whether Haidarabad in the Deccan or Haidarabad in Sindh was meant.

This is also a case of *latent ambiguity*.

**Purport of the Section.**—This section modifies the rule laid down in section 94, by providing that where language of a document correctly describes two sets of circumstances but could not have been intended to apply to both, evidence may be given to show to which set it was intended to apply.

**Kind of Evidence admissible under this Section.**—Besides general proof of all the facts and circumstances respecting the persons or things to which the instrument relates which is undoubtedly legitimate and often necessary, evidence in order to enable the Court to understand the meaning and application of the language employed, the declarations of the writer of the instrument will, as before mentioned, be receivable in evidence in a particular class of cases, namely, where extrinsic evidence has shown that a description in the instrument is alike applicable, with legal certainty to two or more persons or things.

**Evidence of Conduct of Parties.**—(a). In construing a deed of sale where the terms are ambiguous, the conduct of the parties immediately after and acting upon the deed is very important—*Cheetun Lal v. Chutterdharee Lall*, 19 W. R. 432.

(b). The real intention of the parties to deed is to be collected chiefly, no doubt, from the terms of the instrument itself, but to a certain extent also from the circumstances existing at the time of its execution, and further by the conduct of the parties since its execution. *Vide* remarks of their Lordships of the Privy Council, in the case of *Robert Watson & Co. v. Mohesh Narain Roy*, 24 W. R. 176.

97. When the language used applies partly to one set of existing facts, and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply.

Evidence as to application of language to one of two sets of facts, to neither of which the whole correctly applies.]

### *Illustration.*

A agrees to sell to B 'my land at X in the occupation of Y.' A has land at X, but not in the occupation of Y, and he has land in the occupation of Y, but it is not at X. Evidence may be given of facts showing which he meant to sell.

This section is the converse of sec. 96. It is an extension of the rule laid down in sec. 95.

As to wills *vide* sec. 67 of the Indian Succession Act, X of 1865.

**Mis-statement in a Decree, Conveyance, Lease or other Document as to area of lands correctly described.**—Where lands are described as lying within certain boundaries, and there is a mis-statement as to the area of lands, within such boundaries, the boundaries must prevail and the error in the quantity should be considered as a mere false description. *Vide* (1) *Babu Palwan Singh v. Maharaja Maheswar Buksh Singh*, 16 W. R. (P. C.); (2) *Zeenat Ali v. Ram Doyal Poddar*, 18 W. R. 25; (3) *Eshan Chandra Ghose v. Protap Chandra Rai*, 20 W. R. 224; (4) *Kazee Abdool Mannah v. Barada Kanta Banerji*, 15 W. R. 394; (5) *Virjiban Das Madhav Das v. Mahomed Ali Khan*, I. L. R. 5 Bom. 208.

98. Evidence may be given to show the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local, and provincial expressions, of abbreviations and of words used in a peculiar sense.

Evidence as to meaning of illegible characters, &c.

### *Illustration.*

A, a sculptor, agrees to sell to B 'all my mods.' A has both models and modelling tools. Evidence may be given to show which he meant to sell.

*Vide* note to sec. 94 *ante*.

When an expression has a technical meaning, evidence may be given to show that it is used in its technical and not in its ordinary meaning, although it may be perfectly clear and unambiguous in itself; and for the purpose of explaining the meaning of the terms used in the written contract between the same parties, evidence of their former transactions can be received.\*

**Instances.**—(a). In a suit to recover possession of immoveable property under a grant from the Rajah of Pachete, on the ground that the grant was prior in time to the grant from the same grantor, under which the defendants professed to hold, it was found that the plaintiff's grant was dated "25th Falgoon in the year 16." *Held*, that the meaning of the words "in the year 16" might be shown

\* *Vide Bourne v. Guttiff*, 11 C. and F. 45.

by reference to another grant signed by the same officer, from which it appeared that the 'year 37' meant the 37th year of the Rajah of P., and that it corresponded with 1186 B. S.—*Equitable Coal Company v. Gonesh Chander Banerji*, 9 C. L. R. 276.

(b). When the lessee of a mine covenanted to get the whole of the mine 'not deeper than the level of the mine at a particular point,' parol evidence was admitted to show that amongst miners 'level' had a technical meaning different from the ordinary signification of horizontal line—*Clayton v. Gregson*, 5 A. and E. 302.

(c). In a memorandum about a horse race, evidence was admitted to show that the words 'across country' meant that the riders were to jump the obstacles and not go through gates—*Erans v. Pratt*, 3 M. and G. 759.

(d). "So the words 'inhabitant,' 'level,' as understood by miners,— 'thousand,' as locally applied to rabbits on a warren,— 'weeks,' as used in a theatrical contract,— 'months,' as meaning calendar months in a charter-party,— 'days,' as meaning working days in a bill of lading,— 'fur,'— 'corn,'— 'pig-iron,'— 'salt,'— 'freight,'— and many other expressions, which *prima facie* presented no ambiguity, have been interpreted by extrinsic evidence of usage; and their peculiar meaning, when found in connexion with the subject-matter of the transaction, has been fixed, by parol testimony of the sense in which they were *usually* received, when employed in cases similar to that under investigation. So the meaning of the phrase, 'duly honoured,' when applied to a bill of exchange,— of the words 'in turn to deliver,' contained in a charter-party,— and of the expression, 'in the month of October,' as fixing the part of the month, within which a vessel was to sail,— has been ascertained by parol evidence of mercantile usage. So, where a ship was warranted 'to depart with convoy,' extrinsic evidence was admitted to show at what place convoy for such a voyage as the one then contemplated was usually taken; and to that place the parties were presumed to refer. So, also, the responsibility of an underwriter for 'general average' under an ordinary policy of insurance on a ship and cargo may be limited by a custom of trade, so as not to extend to the jettison of goods which have been stowed on deck. So parol evidence has been admitted to show that the term 'weekly accounts' in a building contract has, by the usage of trade, a technical signification, and means accounts of day-work only, exclusive of work which is capable of being measured. Again, where one of the subjects of a charter-party was 'cotton in bales,' oral evidence of the mercantile meaning of this term was received; and it has been proved by similar testimony, that the words 'expected to arrive about November next,' when used

in a bought note, created no contract as to time, but were a mere representation. So, parol evidence has been admitted to show, that, by usage in the hop trade, a sale of 'ten packets of Kent hops at 5*l*,' means 5*l*. per cwt. So, where goods having been sent to a London packer to prepare for exportation, he acknowledged their receipt 'on account of the vendor of the vendee,' evidence of usage was admitted to prove that, when packers signed receipts in this form, it was their duty not to part with the goods without the vendor's further orders. So, also, where an Irish corn-merchant had sent written instructions to his *del credere* agent in London, to sell some oats 'on his account,' parol evidence was held admissible on the agent's part, for the purpose of showing that, by the custom of the London corn trade, he was warranted under these instructions in selling in his own name." *Vide* Taylor, 6th Ed., 1010-1012.

99. Persons who are not parties to a document, or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document.

Who may give evidence of agreement varying terms of document.

### *Illustration.*

A and B make a contract in writing that B shall sell A certain cotton, to be paid for on delivery. At the same time they make an oral agreement that three months' credit shall be given to A. This could not be shown as between A and B, but it might be shown by C, if it affected his interests.

It seems that this section provides an exception to the general rule laid down in section 92.

**Varying.**—The word 'varying' embraces contradictions, additions and subtractions. It should not be understood as restricted to 'varying' in contradistinction to 'contradicting, adding or subtracting from the terms of a document.'

100. Nothing in this chapter contained shall be taken to affect any of the provisions of the Indian Succession Act (X of 1865) as to the construction of Wills.

Saving of provisions of Indian Succession Act relating to Wills.

The provisions as to the construction of Wills will be found in Part XI of The Indian Succession Act, X of 1865.

Sec. 61. Directs what is necessary as to the wording of a Will.

Sec. 62. What enquiries the Court shall make as to the object or subject of a Will.

Sec. 63. Relates to the construction of a Will, when there is a misnomer or misdescription of object.

Sec. 64. Directs when words may be supplied.

Sec. 65. As to the rejection of erroneous particulars in description of subject.

Sec. 66. When part of description may not be rejected as erroneous.

Sec. 67. Extrinsic evidence admissible in case of latent ambiguity.

Sec. 68. Extrinsic evidence inadmissible in cases of patent ambiguity or deficiency.

Sec. 69. The meaning of any particular clause to be gathered from the entire Will.

Sec. 70. When words may be understood in a restricted sense, and when in a sense wider than usual.

Sec. 71. Where a clause is open to two constructions, that which has some effect is to be preferred.

Sec. 72. No part of a Will to be rejected, if reasonable construction can be put on it.

Sec. 73. Interpretation of words repeated in different parts of a Will.

Sec. 74. Testator's intention to be effectuated as far as possible.

Sec. 75. The last of two inconsistent clauses prevails.

Sec. 76. A Will or bequest not expressive of any definite intention is void for uncertainty.

Sec. 77. Words describing subject refer to property, answering that description at testator's death.

Sec. 78. Power of appointment executed by general bequest.

Sec. 79. Implied gift to the object of a power in default of appointment.

See also sections 80 to 105.

## PART III.

## PRODUCTION AND EFFECT OF EVIDENCE.

## CHAPTER VII.

## OF THE BURDEN OF PROOF.

**Rules governing the production and effect of Evidence.**—Mr. Taylor lays down four general rules, which govern the production of testimony. “*First*, the evidence must correspond with the allegations, but the substance only of the issues need be proved; *secondly*, the evidence must be confined to the points in issue; *thirdly*, the burthen of proving a proposition at issue lies on the party holding the substantial affirmative; and *fourthly*, the best evidence, of which the case in its nature is susceptible, must always be produced.”—Evi., 213.

**Purport of the Sections on the subject of Burden of Proof.**—This Chapter of the Evidence Act, which relates to the burden of proof, deals with the subject of presumptions. Sir J. F. Stephen says :—“*First*, it lays down the general principles which regulate the burden of proof (sections 101—106). It then enumerates the cases in which the burden of proof is determined in particular cases, not by the relation of the parties to the cause, but by presumptions (sections 107—111). It notices two cases of conclusive presumptions, the presumption of legitimacy from birth during marriage (section 112), and the presumption of a valid cession of territory from the publication of a notification to that effect in the *Gazette of India* (section 113). This is one of several conclusive statutory presumptions, which will be found in different parts of the Statutes and Acts. Finally, it declares, in section 114, that the Court may, in all cases whatever, draw from the facts before it whatever inferences it thinks just. The terms of this section are such as to reduce to their proper position of mere maxims which are to be applied to facts by the Courts in their discretion, a large number of presumptions to which English law gives, to a greater or less extent, an artificial value. Nine of the most important of them are given by way of illustration.”—Evi. Act, 174.

101. Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

Burden of proof.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

### *Illustrations.*

(a). A desires a Court to give judgment that B shall be punished for a crime which A says B has committed. A must prove that B has committed the crime.

(b). A desires a Court to give judgment that he is entitled to certain land in the possession of B, by reason of facts which he asserts, and which B denies, to be true. A must prove the existence of those facts.

**Reason of the Rule.**—This section lays down in substance the third general rule, which, according to Mr. Taylor, governs the production of evidence. The rule has its foundation in principles of natural reason. It has all along been recognised in jurisprudence, and has received the assent of the common-sense of mankind. It has been adopted in practice, not because it is impossible to prove a negative, but because the negative does not admit of the direct and simple proof, of which the affirmative is capable; and, moreover, it is but reasonable and just that the suitor who relies upon the existence of a fact should be called upon to prove his own case.

**Application of the Rule.**—In the application of this rule regard must be had to two things: (1) Negative averments, or allegations in the negative, should not be confounded with traverses of affirmative allegations; (2) It should be remembered that the affirmative and negative of the issue mean the affirmative and negative of the issue in *substance*, and not merely its affirmative and negative in *form*, for in many cases the party, by making a slight alteration in the drawing of his pleadings, may give the issue a negative or affirmative form, at his pleasure. In *Soward v. Leggatt*, 7 C. and P. 613, on the form of pleadings, each party contended that the *onus* was on the other. Lord Abinger, C. B., said: "Looking at these things according to common sense, we should consider what is the substantive fact to be made out, and on whom it lies to make it out. It is not so much the *form of the issue* which ought to be considered, as the *substance and effect of it*. In many cases a party, by a little difference in the drawing of his pleadings, might make it, either affirmative or negative as he pleased."

**Exceptions to the Rule.**—Mr. Taylor mentions two exceptions to the general rule, that the burden of proof lies on the party who



substantially alleges the affirmative. *First*, if a *disputable presumption of law* is in favour of an affirmative allegation, the party who supports the negative must call witnesses to rebut this presumption. *Second*, where the subject-matter of the allegation *lies peculiarly within the knowledge* of one of the parties, that party must prove it, whether it be of an affirmative or a negative character, and even though there be a presumption of law in his favour. In this connection it is well to remember the remarks of Lord Justice Bowen. He, in the case of *Abrath v. North-Eastern Railway Company*, observed: "If the assertion of a negative is an essential part of the plaintiff's case, the proof of the assertion still rests upon the plaintiff. The terms negative and affirmative are after all relative, and not absolute. .... Whenever a person asserts affirmatively as part of his case that a certain state of facts is present or is absent, or that a particular thing is insufficient for a particular purpose, that is an averment which he is bound to prove positively."

"It is to be carefully remarked that although, as a general rule, the law neither presumes liability nor discharge from liability, nor any fact or state of things essential to such liability or discharge not established by competent means, the law does not in the absence of proof of a negative, where it is material to a right, assume the affirmative to be true; it is, on the contrary, frequently essential to the establishment of right to prove the negative of facts." —Starkie, 588."

(a). Where, under an Act, certain things are required to be done before any liability attaches to any person in respect of any right or obligation, it is for the person who alleges that that liability has been incurred to prove that the things prescribed in the Act have been actually done—*Ashanullah Khan Bahadoor v. Trilochun Bagchi*, I. L. R. 13 Cal. 197.

(b). In the Full Bench case of *Poolin Behari Sein v. Messrs. Watson & Co.*, 9 W. R. 190, it was laid down as follows: "The general rule of evidence is that if, in order to make out a title, it is necessary to prove a negative, the party who avers a title must prove it."

102. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

On whom burden of proof lies.

*Illustrations.*

(a). A sues B for land of which B is in possession, and which, as A asserts, was left to A by the will of C, B's father. If no evidence were given on either side, B would be entitled to retain his possession. Therefore the burden of proof is on A.

(b). A sues B for money due on a bond. The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies. If no evidence were given on either side, A would succeed, as the bond is not disputed and the fraud is not proved. Therefore the burden of proof is on B.

**Purport of the Section.**—This section supplies a test which is frequently applied in the English cases, for the purpose of ascertaining on whom the burden of proof lies. The English text-writers usually employ two tests, namely, 1st—Consider which party would succeed if no evidence were given on either side; 2nd—Examine what would be the effect of striking out of the record the allegation to be proved, bearing in mind that the *onus* must lie on whichever party would fail, if either of these steps were pursued.\* The Indian Evidence Act adopts the first test only. This test was suggested by Alderson B, in *Amos v. Hughes*,† in 1835, and has been subsequently adopted and frequently recognised by learned Judges and Jurists.

The following observations of Lord Justice Bowen in *Abrath v. North-Eastern Railway Company*, L. R. 11 App. Cases 251, are worthy of careful study: "Whenever litigation exists, somebody must go on with it; the plaintiff is the first to begin; if he does nothing, he fails; if he makes a *prima facie* case and nothing is done to answer it, the defendant fails. The test, therefore, as to the burden of proof or *onus* of proof, whichever term is used, is simply this, to ask oneself which party will be successful if no evidence is given, or if no more evidence is given than has been given at a particular point of the case, for it is obvious that as the controversy involved in the litigation travels on, the parties from moment to moment may reach points at which the *onus* of proof shifts, and at which the tribunal will have to say that if the case stops there, it must be decided in a particular manner. The test being such, as I have stated, it is not a burden that goes on forever resting on the shoulders of the person upon whom it is first cast. As soon as he brings evidence, which, until it is answered, rebuts the evidence against which he is contending, then the balance descends on the other side, and the

\* *Vide* Taylor, 6th Ed., 372.

† *Vide* 1 Moo. and R., 464.

burden rolls over until again there is evidence which once more turns the scale. That being so, the question of *onus* of proof is only a rule for deciding on whom the objection of going further, if he wishes to win, rests."

**Negative Allegation.**—If, to an action for not executing a contract in a workmanlike manner, the defendant plead that the work was properly done, or if a declaration allege that a horse sold under a warranty was unsound, and this fact be traversed by the plea, the *onus*, in either case, will lie on the plaintiff; and the same rule will prevail in an action brought against an attorney for not using due diligence, or against a merchant for not loading a sufficient cargo on board a ship pursuant to a charter-party, or against an architect for not building houses according to a specification, and indeed in every case in which the plaintiff grounds his right of action upon a negative allegation, and where, of course, the establishment of this negative is an essential element in support of his claim.—Taylor's Evi., 373-74, 6th Ed.

103. The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Burden of proof  
as to particular  
fact.

### *Illustration.*

A prosecutes B for theft, and wishes the Court to believe that B admitted the theft to C. A must prove the admission. B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.

This section is an amplification of sec. 101.

**Purport of the Section.**—The general principle of law is that the man who brings another before a judicial tribunal must rely on the strength of his own right and the clearness of his own proof, and not on the want of right or the weakness of proof, in his adversary. When, however, the defendant, or either litigant party, instead of denying what is alleged against him, relies on some new matter, which, if true, is an answer to it, the burden of proof changes sides; and he, in his turn, is bound to show a *prima facie* case at least; and if he leaves it imperfect, the Court will not assist him.

**Shifting of Burden of Proof.**—The burden of proof is shifted by those presumptions of law which are rebuttable; by presumptions of fact of the stronger kind; and by every species of evidence strong enough to establish a *prima facie* case against a party. When a presumption is in favour of the party who asserts the negative, it only affords an additional reason for casting the burden of proof on his adversary; it is when a presumption is in favour of the party who asserts the affirmative that its effect becomes visible, as the opposite side is then bound to prove his negative.—Best, 8th Ed., 265. *Vide* note to section 102 *ante*.

Sir J. F. Stephen, in his Digest, sec. 95, says: "As the proceeding goes on, the burden of proof may be shifted from the party, on whom it rested at first by his proving facts which raise a presumption in his favour."

*Rulings under secs. 101, 102 and 103.*

**Adverse Possession.—Arts. 142 and 144 of Limitation Act.**—(a). In cases falling under art. 142, the plaintiff must, at the outset, show possession within twelve years, and cannot rest merely on a proof of title, while in cases falling under art. 144, the plaintiff may rest content with proof of title only in the first instance, and the burden lies on the defendants to show that they have had a possession inconsistent with the title of the plaintiff for more than twelve years before the suit—*Faki Abdulla v. Babaji Gungaji*, I. L. R. 14 Bom. 458. *Vide* also I. L. R. 5 All. 1; I. L. R. 16 Cal. 473.

(b). In cases falling within art. 144, it lies on the defendant to prove that his adverse possession commenced more than twelve years prior to the institution of the suit—*Chinto v. Janki*, I. L. R. 18 Bom. 51.

**Adverse Possession.—Ejectment.**—(a). Where a plaintiff claims land from which he alleges that he has been dispossessed, the burden is upon him to show possession and dispossession within twelve years, or, at least, that the cause of action arose within twelve years. *Vide* (1) *Beer Chand Jobraj v. The Deputy Collector of Bhullooah*, 13 W. R. (P. C.) 23; (2) *Moro Desai v. Ram Chundra Desai*, I. L. R. 6 Bom. 508; (3) *Kally Churn Sahoo v. The Secretary of State for India in Council*, I. L. R. 7 Cal. 225; (4) *Mano Mohun Ghose v. Mothura Mohun Roy*, I. L. R. 6 Cal. 725.

(b). In all actions for ejectment, where the defendant is admittedly in possession and under a claim of title, it lies upon the plaintiff to prove his title and his possession within 12 years before the commencement of the suit—*Mohima Chunder Mazoomdar v. Mohesh Chunder Neoghi*, I. L. R. 16 Cal. 473.

(c). In a suit for possession, it was found that the plaintiff had been in possession within 12 years before the institution of the suit, but he had been wrongfully dispossessed by the defendant. The plaintiff was unable to prove possession previous to being ousted, for a longer period than 11 years. *Held*, that the ouster by the defendant having been wrongful, the *onus* was not thereby shifted to the plaintiff, and that, under the circumstances, the defendants were bound to prove their title—*Brojo Chunder Kur v. Koylash Chunder Kur*, 11 C. L. R. 133.

**Adverse Possession.—Joint Owners.**—In the case of *Watson & Co. v. Ram Chand Dutt*, I. L. R. 18 Cal. 10, their Lordships of the Privy Council made the following observations :—“It seems to their Lordships that if there be two or more tenants in common, and one (A) be in actual occupation of part of the estate, and is engaged in cultivating that part in a proper course of cultivation as if it were his separate property, and another tenant in common (B) attempts to come upon the said part for the purpose of carrying on operations there, inconsistent with the course of cultivation in which A is engaged, and the profitable use by him of the said part, and A resists and prevents such entry, not in denial of B's title, but simply with the object of protecting himself in the profitable enjoyment of the land, such conduct on the part of A would not entitle B to a decree for joint possession. . . . . In Bengal, the Courts of Justice, in case where no specific rule exists, are to act according to justice, equity and good conscience, and if in a case of shareholders holding lands in common, it should be found that one shareholder is in the act of cultivating a portion of the lands which is not being actually used by another, it would scarcely be consistent with the rule above indicated to restrain him from proceeding with his work or to allow any other shareholder to appropriate to himself the fruits of other's labour or capital.” But such property does not cease to be joint, merely because it is used so as to produce more profit to one of the owners who has incurred expenditure or risk for that purpose. *Vide also Luchmeshur Singh v. Manowar Hossein*, I. L. R. 19 Cal. 253.

**Adverse Possession.—Suit by Mortgagor against Trespasser dispossessing Mortgagee in possession.**—Land was mortgaged with possession to A. Subsequent to the mortgage, A was dispossessed by B, a trespasser. The mortgagor sued both A and B for possession. B pleaded 12 years' adverse possession. *Held*, that it lay on the defendant B to prove that his adverse possession commenced more than 12 years prior to the institution of the suit—*Chinto v. Janki*, I. L. R. 18 Bom. 51.

**Adverse Possession.—Vendor out of possession.**—In a suit brought by a vendor to recover possession of immoveable property, which was not in the possession of his vendor at the time of the sale, the defence having raised the point of adverse possession for more than 12 years: *Held*, that the *onus* lay upon the plaintiff to show that his claim was not barred by the defendant's adverse possession by proving that his vendor was in possession during the years preceding the suit—*Kashinath Sitaram One v. Shridhar Mahadeb Patankar*, I. L. R. 16 Bom. 343.

**Benami.**—(a). When defendants admitted the execution of a document purporting to be a conveyance by them of certain land to the plaintiff for valuable consideration, but contended that the deed was not intended to have any effect, and was merely a *benami* transaction. *Held*, in a suit for a declaration of his right by a plaintiff in possession of the land, that, under the circumstances of the case, the *onus* was on the plaintiff to show that the deed was what it appeared to be, and not a mere paper transaction—*Mookto Keshee Debi v. Anunda Chunder Chattopadhyaya*, 2 C. L. R. 48. The correctness of this decision may be questioned. At any rate, it should not be taken as laying down any general proposition of law.

(b). Where a plaintiff claims land as purchaser in good faith from a *benamidar*, who has been registered as owner, and who, by the act of the true owners, had been allowed to become the true owner, the burden lies upon him. For, it is obvious, that when it has been shown that the alleged vendor is not the true owner, the plaintiff can only reply on his claim as purchasing in good faith for value from a person who, by the act of the true owners, had become the apparent owner—*Rutto Singh v. Bajrang Singh*, 13 C. L. R. 280.

(c). The burden of proof lies upon him who alleges that the certified purchaser and registered owner is a *benamidar*—*Bajinath Sahay v. Raghunath Persaud Singh*, 12 C. L. R. (P. C.) 186.

(d). The habit of holding land *benami* is inveterate in India, but that does not justify the Courts in making every presumption against apparent ownership—*Munshi Buzlur Raheem v. Shamshunissa Begum*, 11 Moo. I. A. 602.

(e). When a person sues for possession of land, and the defendant alleges that the plaintiff purchased the land *benami* for him, the *onus* is on the plaintiff to establish a *prima facie* case, and the allegation of the defendant does not shift the burden of proof—*Hariram v. Ram Kumar Upadhyaya*, I. L. R. 8 Cal. 759.

(f). When a purchase is made by a Hindu or Mahomedan in the name of his son, the presumption is in favour of its being a *benami*

purchase, and it lies on the party in whose name it was purchased to prove that he is solely entitled to the legal and beneficial interest in the estate—*Naginbhai v. Abdulla*, 1 L. R. 6 Bom. 717. *Vide* also (1) *Ahmedali Khan v. Hardwari Mull*, 14 W. R. (P. C.) 14; (2) *Gopi Krishna Gosain v. Gun Persaud Gosain*, 6 Moo. I. A. 53; (3) *Sayyud Uzhuruli v. Bibi Utaf Fatima*, 13 W. R. (P. C.) 1.

(g). In the absence of evidence to show the source from which the purchase-money was derived, there is no presumption that property purchased in the name of a Hindu wife is the property of her husband, and acquired with his money—*Chowdhraim v. Tarini Kant Lahiri*, 11 O. L. R. 41.

(h). Where a person became the purchaser of a talook under a decree for sale obtained by judgment-creditors of the owner, and an assignee of a judgment-creditor sued to have it declared, that the purchase did not effect any transfer of the ownership of the talook : *Held*, that the *onus* was on the plaintiff to prove that the talook in question was still the property of the judgment-debtors, and not the property of the purchaser. In considering an allegation of *benami* purchase under such circumstances, it is material to enquire what relation the purchase-money paid bore to the value of the estate, and the decision of the Courts should rest not upon suspicion, but upon legal grounds established by legal testimony—*Sreemun Chunder Dey v. Gopal Chunder Chuckerbutty*, 7 W. R. (P. C.) 10.

(i). *Benami* purchase in the names of children, without any intention of advancement, being frequent in India, the burden of proof whether, what was *prima facie*, the nature of the transactions was really not so, is upon those in whose names the purchases were made—*Gopes Krist Gosain v. Gunga Persaud Gosain*, 6 Moo. I. A. 53.

(j). *Vide Faiz Buksh Chowdhary v. Fukeeroodeen Mahomed Abassun Chowdhary*, 14 Moo. I. A. 234.

**Bond.**—(a). The plaintiff in a suit on a bond for money accounted for not producing it by alleging that the defendant had stolen it. The defendant admitted the execution of the bond, but alleged that he had paid the money. *Held*, that the defendant was bound to begin and prove payment either by the production of the bond or other evidence or by both—*Chuni Kuar v. Udai Ram*, 1 L. R. 6 All. 73.

(b). Where the plaintiff sued on two bonds, and the defendant, in his written statement as well as in his deposition, admitted execution of the bonds, but pleaded non-receipt of consideration, it was held the question of execution could not be gone into, and that the only

question which could be tried was non-receipt of consideration—*Gorakh Babaji v. Vithal Narayan Joshi*, I. L. R. 11 Bom. 435.

(c). Where, in a suit by the endorsee for a *hundi* against his immediate endorser, the defendant pleads want of consideration, the *onus* is on him to prove his plea—*Govindram Marwari v. Mantora Sahoo*, 1 O. L. R. 429.

(d). Where the defendant admits the execution of the bond sued upon, but pleads that consideration has not been paid, it is upon the defendant to prove that the fact stated by him in the bond is really different from what it was stated to be—*Manik Lal Baboo v. Ramdass Mozoomdar*, 10 W. R. 132. *Vide* also (1) *Raghunath Dass v. Luchmi Narayn Singh*, 10 W. R. 407; (2) *Chuni Kuar v. Udai Ram*, I. L. R. 6 All. 73; (3) *Rajeswari Kuar v. Ray Bal Krishen*, I. L. R. 9 All. 713; (4) *Fulli Bibi v. Basiradin Midha*, 12 W. R. (F. B.) 25; (5) *Kurusul Koer v. Raj Kali Koer*, 17 W. R. 439; (6) *Ali Shah v. Amani Begum*, 19 W. R. (P. C.) 149; (7) *Meherunnissa v. Abdul Ghani*, 17 W. R. 509.

(e). On 2nd August 1872, A. K. filed a plaint against M. H. and M. R., in which he alleged that on 1st April 1870, M. R. had given a *hundi* for Rs. 500, for value received, to A. K.; that on 27th March 1871, M. H. purchased this *hundi* from A. K., promising to pay him Rs. 534 for it; that M. H. gave the *hundi* to his brother I. H., for the purpose of obtaining payment of the amount from M. R., and that I. H. subsequently informed A. K. that the *hundi* had been lost. A. K. accordingly prayed that the defendants M. H. and M. R. might be decreed to pay to him Rs. 534 with profit and interest. M. H. denied that he had purchased the *hundi* from A. K., who, he alleged, had given the *hundi* to I. H. for the purpose of getting it cashed. M. R. admitted that he had executed the *hundi* and had given it to A. K. for Rs. 500. He further alleged that it had been presented to him for payment by I. H., to whom he had paid the amount with interest on 31st March 1871, and he produced the *hundi* with a receipt, purporting to be by I. H., endorsed on it. The trying Judge, after settlement of issue, on 25th June 1874, added I. H. as a party-defendant. I. H. alleged that A. K. had given him *hundi* for the purpose of getting it cashed, denied the payment by M. R., alleged the endorsement on the *hundi* to be a forgery, &c. *Held*, that the admission by M. R. of the drawing of the *hundi* for value received laid on him the burden of proving payment, and that, though the possession by M. R. of the *hundi* was a circumstance in his favour, yet, as it did not in itself amount to proof of payment, the *onus probandi* was not thereby shifted to the plaintiff—*Abdul Karim v. Manjihansraj and others*, I. L. R. 1 Bom. 295.



**Boundary Dispute.**—(a). On questions of boundary, especially where the dividing line in dispute runs through waste lands which have not been the subject of definite possession, the rule as to the burden of proving the affirmative is not applicable. The litigants are in the position of counter-claimants, and both parties are bound to do what they can to aid the Court in ascertaining the true line—*Lukhi Narain Jagader v. Jadunath Deo*, I. L. R. 21 Cal. 504. In this case, their Lordships observed: "It is of frequent occurrence, especially in cases where the disputed line of division runs, between waste lands, which have not been the subject of definite possession, that no satisfactory evidence is obtainable. That circumstance cannot relieve the Court of the duty of settling a line, upon the evidence which is laid before it. The ordinary rule regarding the *onus* incumbent on the plaintiff has really no application to cases of that kind. The parties to the suit are in the position of counter-claimants; and it is the duty of the defendant, as much as of the plaintiff, to aid the Court in ascertaining the true boundary. Were other rule recognised, the result might be that some boundaries would be incapable of judicial settlement."

(b). Where a dispute arises regarding the direction of a boundary, which one of the parties to a suit has demolished, and the other party proves its general direction, the *onus* of proof that the direction is wrongly stated, if it be so, lies on the former, who removed the boundary—*Jadu Nath Mullick v. Kaleekisto Tagore*, 25 W. R. 524.

(c). In a case of disputed boundary between a *lakhiraj* tenure and a *zemindar's* *mal* land, there is no presumption in favour of either party, and it lies upon the plaintiff to prove the case set up by him—*Bir Chundra v. Ramgati Dutt*, 8 W. R. 209; *Gangamala Chowdhraïn v. Madhab Chundra Nag*, 10 W. R. 413.

(d). Lands admittedly situate within the boundaries of a *zemindari* are *prima facie* to be considered as part of the *zemindari*; and it is for those who allege that they have been separated from the general lands of the *zemindari*, and that they have been settled as *shikmi taluq* to establish this allegation—*Wise v. Bhoobun Moyi Debi*, 3 W. R. (P. C.) 5.

(e). *Vide Rajkumar Roy v. Govind Chunder Roy*, I. L. R. 19 Cal. 660.

**Contract.—Breach of Warranty.**—If a purchaser alleges breach of warranty by vendor on a sale and delivery of goods, after acceptance following upon an examination, the burden of proof lies upon him, and he is bound to prove the breach of contract by the vendor by cogent evidence sufficient to rebut the presumption of due performance that arises from such acceptance—*Gan Kim Swee v. Ralli Brothers*, I. L. R. 13 Cal. (P. C.) 237.

**Cause of Action, identify of.**—When separate suits are brought, and the defendant pleaded that the two causes of action were so identical that he was precluded by sec. 43 of the Civil Procedure Code from filing separate suits, the *onus* was on the defendant to show that the matters were the same—*Upendra Lal Mukerji v. The Secretary of State for India in Council*, I. L. R. 20 Cal. 716.

**Collision.**—(a). If a damage suit for collision be instituted in Admiralty, and the defendant making no charge of negligence against the plaintiff denies his averments and pleads inevitable accident, the plaintiff on the trial must begin—*The Benmore*, 4 L. R. Adm. and Ec., 132; *The Otter*, S. V., 203.

(b). In cases of collision at sea, the master and owners of the colliding vessel, even though compelled by law to take a pilot on board, are *prima facie* liable for damage caused by their ship; and in seeking to exonerate themselves, the burden of proof is on them to show that the neglect which caused such damage was that of the pilot, and solely his—*The Ship Glencoe*, 1 Boulnois' Rep. 105; *Mahomed Yasuf v. The P. and O. Steam Navigation Co.*, 6 Bom. H. O. Rep. 98.

**Criminal Procedure Code.**—(a). The right to restrain another from exercising ordinary proprietary rights over his own land is in the nature of an easement different from the ordinary rights of owners of land; the burden of proof in such cases lies upon the party alleging such rights—*In the matter of Hari Mohun Thakur v. Kissen Sundari*, I. L. R. 11 Cal. 52.

(b). An order passed by a Magistrate under secs. 107 and 112 of the Criminal Procedure Code, requiring any person to 'show cause' why he should not be ordered to furnish security for keeping the peace, is not in the nature of a rule *nisi* implying that the burden of proving innocence is upon such person. The *onus* of proof lies upon the prosecution to establish circumstances justifying the action of the Magistrate in calling upon persons to furnish security—*Queen-Empress v. Abdul Kadir*, I. L. R. 9 All. 452; *Dunne v. Hem Chundra Choudhary*, 4 B. L. R. (F. B.) 46; and *Queen v. Niranjun Singh*, N. W. P. H. C. R. 1870, p. 431.

(c). Where an accused person alleges that an offence with which he is charged has been compounded so as to take away the jurisdiction of the Criminal Courts to try it, the *onus* is on him to show that there was a composition valid in law—*Murray v. The Queen-Empress*, I. L. R. 21 Cal. 103.

**Damages for Defamation.**—In a suit for damages for defamation of character, the plaintiff must start his case by showing that he

was not guilty of the offence charged, and it will then be upon the defendant to show that he made the imputation in good faith and for the public good—*Mohendro Chunder Chuckerbutty v. Surbo Rokhya Debta*, 11 W. R. 534.

**Damages for Malicious Prosecution.**—To maintain an action for a malicious prosecution, the plaintiff has to prove, first, that he was innocent, and that his innocence was pronounced by the tribunal before which the accusation was made; secondly, that there was want of reasonable and probable cause for the prosecution, or, as may be otherwise stated, that the circumstances of the case were such as to be in the eyes of the Judge inconsistent with the existence of reasonable and probable cause; and, lastly, that the proceedings of which he complains were initiated in a malicious spirit, that is, from an indirect and improper motive, and not in furtherance of justice. *Vide Hall v. Venkata Krishna*, I. L. R. 13 Mad. 394.

*Vide also* (1) *Babu Ram Buddan Singh v. Sardar Doyal Singh*, 17 W. R. 101; (2) *Babu Gunesk Dutt Singh v. Mugneeram Chowdhary*, 17 W. R. (P. C.) 283; (3) *Gour Hari Dass Mohunt v. Hyagrib Dass Mohunt*, 14 W. R. 425; (4) *Raghavendra v. Kashinath Bhat*, I. L. R. 19 Bom. 717.

**Deccan Agriculturists' Relief Act (XVII of 1879).**—The intention of the Legislature in enacting the Deccan Agriculturists' Relief Act (XVII of 1879) clearly was to relieve the debtor of the necessity of proving failure of consideration, although admitted in the bond on which he is sued, and the execution of which he admits—*Malogi Santaji v. Vithu Hari*, I. L. R. 9 Bom. 520.

**Declaratory Decree.**—In a suit for a declaratory decree after confirmation of title, the plaintiff must prove the title which he seeks to have confirmed—(1) *Jalok Singh v. Garwar Singh*, 2 W. R. 167; (2) *Royes Mullah v. Madhu Sudun Mondul*, 9 W. R. 154; (3) *Madan Mohan Saha v. Bharat Chunder Roy*, 11 W. R. 249; (4) *Parsid Narain Singh v. Bisseshar Dayal Singh*, 7 W. R. 148.

**Deeds.**—(a). When the plaintiff, the alleged executant of a registered deed denying its execution, sues to set it aside on the ground that it is spurious or otherwise void, the burden of proving its execution and its genuineness is cast upon the defendant—*Makima Chunder Dhar v. Jugal Kishor Bhattacharji*, I. L. R. 7 Cal. 736.

(b). Where a person contends for a particular construction of a document, which is not the *prima facie* construction, and which is contrary to Hindu law and to the established custom of construing documents in the particular part of the country, the burden of proof

lies on the person who contends that the contract should be governed, not by general, but by particular rules—*Tej Chand v. Srikanth Ghosh*, 3 Moo. I. A. 261.

(c). The burden of proving that an alteration, which appears on the face of a bill, was made under such circumstances as not to vitiate it, lies on the plaintiff—*Byles on Bills* (11th Ed.) 324.

**Easement.**—(a). Where the right to have a way or water-course over certain land is disputed by the owner thereof, and an order under sec. 532 of the Code of Criminal Procedure has been passed by the Magistrate in favour of the person claiming the right, the fact of such an order having been made will not be sufficient to relieve the latter from the *onus* of proving the claim, in a subsequent suit by the owner to establish his right to the exclusive use of the land—*Obhoy Churn Dey v. Lukhy Monsee Bewa*, 2 C. L. R. 555; *Puchai Khan v. Abed Sirdar*, 21 W. R. 140, overruled.

(b). The right to restrain another from exercising ordinary proprietary rights over his own land is of the nature of an easement different from the ordinary rights of ownership of land; the burden of proof would, therefore, lie upon the party alleging such rights. *In re Hurry Mohun Takur*, I. L. R. 11 Cal. 52. *Vide also Ouraet v. Krishna Sundari Dasi*, 15 W. R. 83.

**Fraud.**—(a). It is a general rule of law and jurisprudence that fraud cannot be presumed, and that the burden of proving that any transaction is fraudulent lies upon the person seeking to impeach its validity—*Rajendra Narain Rai v. Bijai Govind Singh*, 2 Moo. I. A. 181.

(b). A plaintiff who charges another with fraud must himself prove the fraud, and he is not relieved from this obligation, because the defendant has himself told an untrue story—*Mahomed Golab v. Mahomed Sulliman*, I. L. R. 21 Cal. 612.

(1). *Ram Gati and others v. Mantaj Bibi*, 10 W. R. 281.

(2). *Lala Rudra Prasaud v. Binode Ram Sein*, 10 W. R. 321.

(3). *Mohima Chundra Mullick v. Baroda Soondari Dassi*, 12 W. R. 147.

(4). *Roopram Dass v. Saseeram Nath Karmokar*, 23 W. R. 141.

(5). *Kabiran v. Safhan*, 24 W. R. 388.

(6). *Sikar Chand v. Dalpati Singh*, I. L. R. 5 Cal. 363.

(7). *Natha Singh v. Jodha Singh*, I. L. R. 6 All. 406.

(8). *Jhatipal Upadhya v. Juggurnath Gurg*, 1 Moo. I. A. 1.

(9). *Baboo Lekraj v. Baboo Mahtab Chand*, 14 Moo. I. A. 393.

(10). *Jadunath Bose v. Shamsunnessa Begum*, 11 Moo. I. A. 602.

(11). *Adam Isubhai v. Jumnadas Ranchordas*, I. L. R. 17 Bom. 94.

**Hindu Law.—Adoption.**—(a). In a suit brought to maintain the plaintiff's title as heir against a defendant, who relied upon an adoption as defeating the title of the plaintiff, burden of proving the adoption to be permitted by the family custom was upon those who alleged it to be so; whereas, if the family had been generally governed by Hindu law, the *onus* would have been on those who alleged the exclusion of the right to adopt—*Fanindra Deb Raikat v. Rajeswar Das*, I. L. R. 11 Cal. (P. C.) 463.

(b). In an adoption made by a Hindu widow, under authority conferred upon her for that purpose by her husband, the authority must be strictly proved—*Chowdhary Pudum Singh v. Koer Oodey Singh*, 12 Moo. I. A. 350.

(c). Where plaintiff, as a collateral heir, seeks to recover possession of property from the hands of the defendant, who alleges himself to be the adopted son of the deceased owner, the plaintiff must make out first his title of heirship—*Kalikishore Dutt v. Beepin Chunder Dutt*, I. L. R. 18 Cal. (P. C.) 201.

**Hindu Law.—Alienation of ancestral property by the father.**—(a). In a suit brought by the sons to set aside an alienation of ancestral property by the father, on the ground that the debt was contracted for immoral or illegal purposes, the burden of proof lies upon the plaintiffs (sons) to prove that the debt was contracted for such purposes—*Sadasib Dinkar Joshi v. Dinkar Narayan Joshi*, I. L. R. 6 Bom. 520. *Vide* (1) *Bhagbut Persaud Singh v. Girija Koer*, I. L. R. 15 Cal. (P. C.) 717; (2) *Nanomi Babuasin v. Modhun Mohun*, I. L. R. 13 Cal. (P. C.) 21; (3) *Adurmoni Debi v. Chowdhary Sib Narain Kur*, I. L. R. 3 Cal. 1; (4) *Bhawani Bux v. Ram Dal*, I. L. R. 13 All. 216; (5) *Beni Madho v. Basdeo Patak*, I. L. R. 12 All. 99.

(b). The power of the father, as representative of the family, to bind the sons' interests in the family estate, except in special cases, being judicially recognized, the *onus* of establishing the existence of those special circumstances necessarily lies on the sons for the purpose of defeating his creditor's remedies against the ancestral estate—*Chintamanrao Mehendale v. Kashinath*, I. L. R. 14 Bom. 320.

(c). *Vide* also (1) *Hardu Narayan Sahu v. Ruder Perkash Misser*, I. L. R. 10 Cal. 626; (2) *Girdhari Lal v. Kantoolol*, 22 W. R. 59; (3) *Ponnappa Pillai v. Pappuwayyengar*, I. L. R. 9 Mad. 343; (4) *Sundraraja Ayyangar v. Jaganada Pillai*, I. L. R. 4 Mad. 111;

(5) *Suraj Bunsí Koer v. Sheo Prasad Singh*, I. L. R. 5 Cal. (P. C.) 148 ; (6) *Ponnappa Pillai v. Pappuwayyanganar*, I. L. R. 4 Mad. 2 ; (7) *Honuman Singh v. Nanak Chand*, I. L. R. 6 All. 193 ; (8) *Khatilal Rahaman v. Govind Prasad*, I. L. R. 20 Cal. 328 ; (9) *Lekhraj Rai v. Mahtab Chand*, 14 Moo. I. A. 393.

(d). The authorities seem to come to this that in those cases where a person buys ancestral estate or takes a mortgage of it from the father, whom he knows to have only a limited interest in it, for a sum of ready money paid down at the time of the transaction, such person, in a suit by the sons to avoid it, must establish that he made all reasonable and fair inquiry before effecting the sale or mortgage, and that he was satisfied by such inquiry, and believed, in paying his money, that it was required for the legal necessities of the joint family, in respect of which the father, as head and managing member, could deal with and bind the joint ancestral estate—*Lal Singh v. Deo Narain Singh*, I. L. R. 8 All. 279.

(e). In families governed by Mitakshara, it is only on condition of the son's showing, the *onus* being on him, that the father's debt has been contracted for an illegal or immoral purposes, that the son, upon a decree against the father alone being executed by the attachment and sale of the family estate, can claim to have the liability limited to the father's own share—*Mahabir Persaud v. Maheswar Nath Sahai*, I. L. R. 17 Cal. (P. C.) 584.

**Hindu Law.—Alienation by Manager for Hindu Minor.**—Where the widow or other guardian of a Hindu minor alienates or charges the estate or any portion of it, the person relying upon this charge or alienation must show that there was a necessity therefor, or at least that he had good ground for supposing that the transaction was for the benefit of the minor—(1) *Lalla Bunshidhar v. Kunwar Bindsari Dutt Singh*, 10 Moo. I. A. 454 ; (2) *Hanooman Prasaud Panday v. Babodi Mouraji Kunwari*, 6 Moo. I. A. 393.

**Hindu Law.—Alienation by Sebait of Dewuttur Property.**—The sebait of an idol's estate has the same right, or an analogous right to that of the manager of an infant heir, and the burden of proving the the existence of necessity for incurring debts or alienating *dewuttur* property lies upon the person who alleges it—*Prasanna Kumari Debi v. Golab Chand*, 14 B. L. R. 458. *Vide also* (1) *Sibessari Debi v. Mothura Nath Acharjya*, 13 Moo. I. A. 270 ; (2) *Jailal Tewari v. Bhuban Gir*, 21 W. R. 334 ; (3) *Narayan v. Chintaman*, I. L. R. 5 Bom. 393 ; (4) *Collector of Thana v. Hari Sitaram*, I. L. R. 6 Bom. 546 ; (5) *Sankar Bharti Sami v. Venkapa Naik*, I. L. R. 9 Bom. 422.

**Hindu Law.—Custom.**—(a). Where a surviving male descendant of the common ancestor of a joint Hindu family bases his claim against other members of the family, not upon the ordinary Hindu law of inheritance, but upon a special custom without reference to claimants' positions in the family, or their capability to satisfy the conditions of heirship, the burden of proving the existence of the custom lies upon the plaintiff—*Thakoor Jietnath Sahi Deo v. Lokenath Sahi Deo*, 19 W. R. 239.

(b). In a suit by a plaintiff who claims to be sebit, to recover property dedicated to idols, where the rule of succession laid down by the endower of the religious institution is not apparent, and the ordinary rule of succession has not been followed, the usage according to which the succession has been regulated must be proved by the plaintiff—*Janoki Debi v. Gopal Acharjia*, 13 C. L. R. (P. C.) 30.

(c). In a suit for the partition of part of *deshgat vatan*, brought by the younger brothers of a joint Hindu family against their eldest brother, the *desai*, the defence was that the *vatan* was held by him as an impartible inheritance, subject to a right, by custom, that a brother should receive maintenance out of the income derived from it. *Held*, that there was no such general presumption in favour of the impartibility of estates of this kind as to shift the burden of proof, which was upon the *desia*, to show that the *vatan* had, contrary to the general Hindu law, been inherited by him alone—*Adrishappa v. Gurushidappa*, I. L. R. 4 Bom. 494.

(d). A family custom must be proved by the person alleging it—(1) *Anand Lal Singh Deo v. Govind Narain Deo*, 5 Moo. I. A. 82; *Udza Aditya Deb v. Jadob Lal Aditya Deb*, I. L. R. 8 Cal. (P. C.) 199.

(e). Where ancestral property has apparently descended in the ordinary way of Hindu property, first to the son and thence to the mother, it lies on those who say that it is confined to the direct descendants of the original donee to prove their case—*Rajah Mohendra Singh v. Jokha Singh*, 19 W. R. (P. C.) 211. *Vide also* (1) *Natukhi Kuari v. Chundri Chentaman Singh*, 20 W. R. 247; (2) *Gopal Narhar Safray v. Hanmant Gonesh Safray*, I. L. R. 3 Bom. 273; (3) *Ram Bharti Jagrupbharti v. Surajbharti Haribharti*, I. L. R. 5 Bom. 682; (4) *Cassumbhoy Ahmedbhoy v. Ahmedbhoy Habibhoy*, I. L. R. 12 Bom. 280; (5) *Raja Valad Shivapa v. Krishnabhai*, I. L. R. 3 Bom. 232.

(f). Where a person relies on a local usage regulating right to land, the subject of alluvion or diluvion, the burden of proving such usage lies upon him—*Rai Manick Chand v. Madharam*, 13 Moo. I. A. 1.

(g). A special usage modifying the ordinary Law of Succession must be ancient and invariable, and must be proved by clear and unambiguous evidence—*Ramaluksmi Ammal v. Sevanatha Permuli Jethurayar*, 14 Moo. I. A. 570.

**Hindu Law.—Disability of Heirs.**—The party who seeks to exclude one of the heirs to property from a share of the inheritance, is bound to show the cause of the exclusion—*Futtick Chunder Chatterji v. Juggut Mohiny Debi*, 22 W. R. 348. *Vide* also (1) *Nullit Chunder Gooho v. Bagola Sundari Dass*, 21 W. R. 249; (2) *Rama Kristna v. Subbakhru*, I. L. R. 12 Mad. 442.

**Hindu Law.—Domicile.**—Where a Hindu family came from the Panjab accompanied by their priests at a time when they were not governed by the Bengal law, and it was afterwards alleged that they were now governed by that law, the *onus* of proving the allegation was held to be with those who made it—*Haro Persaud Roy Chowdhry v. Shibo Shunkari Chowdhraim*, 13 W. R. 47. The case of *Surendra Nath Roy v. Heramoni Burmoni*, 10 W. R. (P. C.) 37, followed.

**Hindu Law.—Incumbrances by Manager.**—(a). Under the Hindu law, the right of a *bond fide* incumbrancer who has taken from a *de facto* manager a charge on lands created honestly for the purpose of saving the estate, or for the benefit of the estate, is not (provided the circumstances would support the charge had it emanated from a *de facto* and *de jure* manager) affected by the want of union of the *de facto* with the *de jure* title. The question, whether a *prima facie* case of a subsisting charge by a deed is made out, involves the consideration of two points; *first*, the actual factum of the deed; and *next*, the consideration for it. The question on whom the *onus* of proof lies in such a suit as that of a mortgagee claiming under a mortgage executed by the manager of an estate during the infancy of the heir is one not capable of a general and inflexible answer. The presumption proper to be made will vary with circumstances, and must be regulated by and dependent on them. The power of the manager for an infant heir to charge an estate not his own, is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the *bond fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, is the thing to be regarded. But of course, if that danger arises or has arisen from any misconduct



to which the lender is or has been a party, he cannot take advantage of his own wrong, to support a charge in his own favour against the heir, grounded on a necessity which his wrong has helped to cause. Their Lordships think that the lender is bound to enquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate—*Hunooman Persaud Pandey v. Mussumat Baboo Munraj Koonwaree*, 6 Moo. I. A. 393.

(b). He who sets up a charge upon a minor's estate, created in his favour by the guardian, is bound to show, at least, that when the charge was so created, there were reasonable grounds for believing that the transaction was for the minor's benefit—*Lalla Bunseedhar v. Koonwar Bindeseree Dutt Singh*, 10 Moo. I. A. 454; *Hunooman-persaud Pandey v. Mussumat Baboo Munraj Koonwaree*, 6 Moo. I. A. 423, followed.

**Hindu Law.—Joint Family.**—(a). Each branch of a family whose original stock has been divided may continue to be a joint family, within the meaning of the Hindu law, subject to all the presumptions arising from that state, and when such a state of facts exists, the *onus* of proving a separation is on those who allege it, the presumption still being, in the absence of such proof, that the branch of the family remained joint amongst themselves—*Batakrishna Naik v. Chintamani Naik*, I. L. R. 12 Cal. 262.

**Hindu Law.—Joint Property.**—(a). Where a family lived in commensality, eating together, and possessing joint property; *held*, that the presumption of law was that all the property they were in possession of was joint property, until it was shown by evidence that one member of the family was possessed of separate property—*Dhurm Das Pandey v. Mussumat Shama Soondri Debiah*, 3 Moo. I. A. 229.

(b). It is a well-established presumption of Hindu law that a family once joint retains that status, unless it is shown to have become divided; and that the ancestral family property remains joint, unless it is shown, by partition or otherwise, to have become separate, and the *onus* lies on the party alleging separation—*Mussumat Chutha v. Baboo Miheen Lall*, 11 Moo. I. A. 369.

(c). In the case of an ordinary Hindu family who are living together, or who have their entire property in common, the presumption is, that everything in the possession of any one member of the family belongs to the common stock. The *onus* of establishing the contrary rests on him who alleges separate property—*Bannoo v. Kasiram*, I. L. R. 3 Cal. (P. C.) 315.

**Hindu Law.—Legal Necessity.**—(a). The burden of proving the existence of a legal necessity lies on the purchaser from the widow—*Mahomed Ashruf v. Brijesshari Dass*, 19 W. R. 426. *Vide* also (1) *Lakshman Bhan Khopkar v. Radhabai*, I. L. R. 11 Bom. 609 ; (2) *Raj Lukhi Dabea v. Gokool Chunder Chowdhary*, 13 Moo. I. A. 209 ; (3) *Hanoomanpersaud Panday v. Mussumat Baboo Munraj Koonwari*, 6 Moo. I. A. 419 ; (4) *Amar Nath Shaha v. Achan Kuar*, I. L. R. 14 All. (P. C.) 420 ; (5) *Cavalay Vencata Narrainpah v. The Collector of Muslipatum*, 10 W. R. (P. C.) 47.

(b). As a general rule, a creditor endeavouring to enforce his claim under a hypothecation bond given by a Hindu father against the estate of a joint Hindu family in respect of money lent or advanced to the father having only a limited interest should, if the question is raised, prove either that the money was obtained by the father for a legal necessity, or that he made such reasonable inquiries as would satisfy a prudent man that the loan was contracted to pay off an antecedent debt, or for the other legal necessities of the family—*Jumna v. Nain Sheikh*, I. L. R. 9 All. 493.

(c). In a suit to set aside sales made by a minor's guardians on the ground that the sales were not justified by any recognised legal necessity, the *onus* is on the defendant to prove the necessity—*Looboo Singh v. Rajendur Laha*, 8 W. R. 364.

**Hindu Law.—Partition.**—The *onus* of proof is on the party seeking to except the property from the general rule of partition according to Hindu law—*Luximon Row Sadasew v. Mullar Row Baji*, 5 W. R. (P. C.) 67. *Vide* also *Biswambhar Sarkar v. Suradhani Dasi*, 3 W. R. 21 ; *Guru Prosoud Mukerji v. Kali Prosoud Mukerji*, 5 W. R. 121.

**Hindu Law.—Partnership.**—The burden of proof of any special contract which impressed the character of mercantile partnership as distinguished from joint or separate property in the Hindu sense, upon the disputed property, lies on the party who pleads such special contract—*Ramprosoud Tewary v. Seo Churn Dass*, 10 Moo. I. A. 490.

**Hindu Law.—Sale by a Guardian under sec. 18 of Act XL of 1858.**—Where a plaintiff alleges fraud or illegality as a ground for setting aside a sale made under sec. 18, the *onus* lies upon him to make out a *prima facie* case of fraud or illegality, and to show that the debt, which formed the consideration of the sale in such a case, was one for which the minor was not responsible—*Siker Chund v. Dulputty Singh*, I. L. R. 5 Cal. 363.

**Hindu Law.—Widow.**—(a). In a suit for setting aside deeds some evidence ought to be given by the plaintiff in order to impeach the deeds he seeks to set aside. But in the case of sales or gifts made by a *purda-*

*nusheen* lady living apart from her relations in a place where she was without her natural advisers, in favour of a person who on some occasions acted as her man of business, the strongest and most satisfactory proof ought to be given by the person who claims under a sale or gift from her, that the transaction was a real and *bond fide* one, and fully understood by the lady whose property is dealt with—*Tacoordeen Tewary v. Nurdab Syed Ali Hossain Khan*, 21 W. R. (P. C.) 340.

(b). As regards an instrument executed by a lady, in favour of her manager and executor, the Privy Council held that the representatives of the latter were bound to prove the honesty of the transaction in accordance with the principle regarding the responsibility of persons in fiduciary relation—*Wazed Khan v. Ewas Ali Khan*, I. L. R. 18 Cal. (P. C.) 545.

(c). The burden of proving the execution of a document by the widow of a deceased debtor upon which the plaintiff relied to bind the estate of the deceased lay upon the plaintiff—*Ram Ratan Sukul v. Nandu*, I. L. R. 19 Cal. (P. C.) 249.

(d). As to alienations by Hindu widow, *vide* (1) *Cavalry Vencata Narrainapak v. The Collector of Masulipatam*, 10 W. R. (P. C.) 47; (2) *Dhondo Ram Chundra v. Balkrishna Govind Nagoekar*, I. L. R. 8 Bom. 190; (3) *Lakshman Bhan Khopkar v. Radhabai*, I. L. R. 11 Bom. 609; (4) *Puran Dai v. Jai Narain*, 4 All. 482; (5) *Seo Persaud v. Laju Rai*, 20 W. R. 102.

**Hindu Law.—Separation.**—Each branch of a family, whose original stock has been divided, may continue to be a joint family within the meaning of the Hindu law, subject to all the presumptions arising from that state, and when such a state of facts exists, the *onus* of proving a separation is on those who allege it, the presumption still being, in the absence of such proof, that the branch of the family remained joint amongst themselves—*Batakrishna Naik v. Chintamani Naik*, I. L. R. 12 Cal. 262. *Vide* also (1) *Bisumbhar Sirkar v. Soorodhony Dassi*, 3 W. R. 321; (2) *Munmohiny Debi v. Sodamini Debi*, 3 W. R. 31; (3) *Mussamat Chetha v. Baboo Miheer Lal*, 11 Moo. I. A. 369; (4) *Banoo v. Kasiram*, I. L. R. 3 Cal. (P. C.) 350.

**Hindu Law.—Separate Acquisition.**—(a). Where property is acquired by the managing representative member of the joint family, the presumption of law and the presumption of fact would be that the property is joint. The burden of proof, under such circumstances, would lie upon those who insist that such property does not form part of the joint family estate—*Chand Hari Maiti v. Rajah Norendra Narain Ray*, 19 W. R. (P. C.) 231.

(b). Every Hindu family is presumably joint in food, worship, and estate; and the presumption is that it remains undivided. If a member of such family is found to be in possession of any property, the family being presumed to be joint in estate, the presumption would be, not that he was in possession of it, as separate property acquired by him, but as a member of a joint family. It is for the person who sets up a different state of things to give evidence thereof and meet the presumption—*Taruck Chunder Totadar v. Judisthir Chunder Kundu*, 19 W. R. 178. This decision followed: (a) *Neel Krishna Deb Burmono v. Beer Chunder Thakoor*, 12 W. R. (P. C.) 21; (b) *Dharm Das Panday v. Shama Sundari Debia*, 6 W. R. (P. C.) 43. The following cases were dissented from: (a) *Khelat Chunder Ghose v. Kunjalol Dhar*, 10 W. R. 333; (b) *Sheo Golam Singh v. Burra Singh*, 10 W. R. 198.

(c). *Vedavalli v. Narayana*, I. L. R. 2 Mad. 19.

(d). *Bannoo v. Kasiram*, I. L. R. 3 Cal. (P. C.) 215.

(e). *Moolji Lilla v. Gokuldas*, I. L. R. 8 Bom. 154.

(f). *Suffayya v. Chellamma*, I. L. R. 9 Mad. 447.

(g). *Sheo Rutton Koonwar v. Gour Behari Bhukut*, 7 W. R. 449.

(h). Where it appears from the evidence that while the family have some ancestral property in joint possession, some of the members of the family acquire separate property from their own funds and deal with it as their own without reference to other members of the family, it may fairly be held to weaken, if not altogether to rebut, the ordinary presumption of Hindu law as to property in the name of one member of a joint family, and to throw upon those who claim, as joint property, that of which they have allowed their co-parcener, trading, and incurring liabilities, on his separate account, to appear to be the sole owner, the obligation of establishing their title by clear and cogent evidence—*Uday Chand Biswas v. Panchoo Ram Biswas*, 11 C. L. R. 514. *Vide Bodh Singh Dhoothoria v. Gunes Chunder Sen*, 19 W. R. (P. C.) 356.

(i). Although presumably every Hindu family is joint in food, worship or estate, there is no presumption that every family possesses property. Unless there is an admitted nucleus of family property, the onus of proof of the existence of joint property lies on the claimant—*Toolseydas Ludha v. Premji Tricumdas*, I. L. R. 13 Bom. 61.

(j). As regards joint property, it may, generally, be laid down that if the plaintiff, as a co-sharer, sues for partition of lands admittedly included within the ambit of the joint estate, and if the

defendant set up an exclusive title, whether *lakhiraj* or *chakran*, or of any other description, there can be doubt that the burden of proving such title would be upon the defendant.

**Hindu Law.—Stridhun.**—The burden of proving property (the subject of a gift by a Hindu widow) to be *stridhun*, rests with those claiming under her—*Srimutty Chundermoni Dassi v. Joy Kissen Sarkar*, 1 W. R. 107. *Vide* also (1) *Brojo Mohan Mahunt v. Radha Kumari*, W. R. (1864) 60; (2) *Bisseshwar Chuckerbutty v. Ramjai Mazoomdar*, 2 W. R. 326.

**Illegitimacy.**—Where in a summary proceeding between persons claiming to be co-heirs, a defendant had been adjudged a co-heir, the burden of proving his illegitimacy lies on the plaintiff's co-heirs—*Ashruf-ood-dowlah v. Hyder Hossein Khan*, 11 Moo. I. A. 94.

**Life-policy.**—If a declaration on a life-policy, after avering that the insurance was effected on a statement made by the plaintiff, that the insured was not subject to habits or attacks of illness tending to shorten life, but was in good health, should allege that this statement was true, and the defendant were to plead that it was false in these respects, that the insured was subject to habits and attacks tending to shorten life, to wit, to habits of intemperance, and attacks of erysipelas, and was ill at the time when the statement was made, the burden of proof would lie upon the plaintiff, because, to entitle the plaintiff to a verdict, some evidence must be given to show that at the time when the policy was effected, the life was miserable—Taylor's Evi., 6th Ed., 373.

**Mesne Profits.**—In suits for mesne profits, when the defendants have been in possession of the property as wrong-doers, it lies upon them to show what were the sums realized as rent during the time of their possession—*Brojendra Coomar Roy v. Madhav Chunder Ghose*, I. L. R. 8 Cal. 343. But see *Inderjeet Singh v. Baboo Radhey Singh*, 21 W. R. 269.

**Minority.**—A defendant who pleads plaintiff's minority as a bar to the suit, is bound to substantiate the plea—*Cheyet Narain Singh v. Bunwaree Singh*, 23 W. R. 395.

**Mohant.—Marriage Forfeiture.**—Where a plaintiff proved his right of succession to a *mutk* on the death of its Mohant, the burden of proving that his subsequent marriage worked a forfeiture of his office and its appendant property and rights lay upon the defendant who impugned the plaintiff's right on account of the marriage—*Gosain Rambharti Jugrupbharti v. Mohant Surajbharti Haribharti*, I. L. R. 5 Bom. 682.

**Possession and Dispossession.**—(a). As a general rule, where a plaintiff claims land from which he alleges he has been dispossessed, the burden is upon him to show possession and dispossession within twelve years—*Maharajah Koowar v. Babu Nund Lal Singh*, 1 W. R. (P. C.) 51. *Vide* also (1) *Rajah Sahib Perhlad Sein v. Maharajah Rajendra Kishore Singh*, 12 Moo. I. A. 337; (2) *Bhootnath Chatterji v. Kedarnath Banerji*, I. L. R. 9 Cal. 125.

(b). Where the suit is for possession, and the cause of action is dispossession, the plaintiff is bound to prove possession and dispossession within twelve years—*Mahomed Ali Khan v. Khaju Abdul Gunny*, I. L. R. 9 Cal. (F. B.) 744. The case of *Radha Gobind Roy v. Inglis*, 7 C. L. R. (P. C.) 364, explained. *Vide Mohiny Mohan Das v. Krishna Kisore Dutt*, I. L. R. 9 Cal. 802.

(c). Where a suit for the recovery of possession of immoveable property is resisted by a plea of adverse possession for more than twelve years, the question of limitation becomes a question of title, and it lies upon the plaintiff in the first instance to give satisfactory *prima facie* evidence of his possession within twelve years of the suit—*Jafar Husain v. Mashug Ali*, I. L. R. 14 All. 193. *Vide* (1) *Mohim Chunder Mazumdar v. Mohes Chunder Neogi*, I. L. R. 16 Cal. (P. C.) 473; (2) *Parmanund Mir v. Sahib Ali*, I. L. R. 11 All. 438.

(d). In a suit brought for a declaration of title, the plaintiff must not only show he has a title, but that he has a subsisting title, which he has not lost by the prescriptive sections of the Limitation Act—*The Secretary of State for India in Council v. Vira Rayan*, I. L. R. 9 Mad. 175.

**Possession and Dispossession.**—**Diluvion.**—(a). Where a person can show that he has been in possession of certain lands prior to such lands becoming diluviated, his possession must be considered as continuing during the time of diluvion, until such time as he becomes dispossessed by some other person; and in such a case the *onus* lies upon the dispossessor to show that he has acquired a title under the law of limitation, which has put an end to the rights of the original possessor—*Kally Churn Sahoo v. The Secretary of State for India in Council*, I. L. R. 6 Cal. 725. *Vide Mahomed Ali Khan v. Khaju Abdul Gunny*, I. L. R. 9 Cal. (F. B.) 744.

(b). In a suit for declaration of title to and recovery of possession of alluvial lands, which had been diluviated more than twelve years before the institution of the suit, the plaintiffs proved their title and possession up to time of diluviation, and alleged that the lands had reformed within twelve years without alleging or proving possession

during that period. The defendants, on the other hand, alleged, that the reformation had taken place more than twelve years before suit, and that they had acquired a title to the lands by adverse possession for that period. *Held*, that in such a case the submergence of the lands after diluvion ought to be presumed until the contrary was shown, and that the *onus* of proving reformation before twelve years and adverse possession was shifted to the defendant—*Mon Mohun Ghose v. Mothura Mohun Roy*, I. L. R. 7 Cal. 225.

**Possession and Dispossession.—Jungly or Unculturable Lands.—**

(a). When a suit is brought for possession of jungly or unculturable lands, or lands which have never been under cultivation, the rule is that the defendant must establish his adverse possession for more than twelve years—*Mahomed Ibrahim v. M. B. Morrison*, I. L. R. 5 Cal. 36. This rule is to apply when the plaintiff succeeds in proving his title to the land in suit.

(b). Where, in a suit for possession of *jungle* land or of land which has been diluviated and which is alleged to have been wrongfully taken possession of by the defendant, the plaintiff gives *prima facie* proof of his title, the *onus* is upon the defendant to show that he (the defendant) has acquired a statutory title by a twelve years' adverse possession which has put an end to the plaintiffs' right—*Kali Churn Sahu v. Secretary of State*, I. L. R. 6 Cal. 725. *Radha Gobind Roy Sahab v. Inglis*, 7 C. L. R. 364, followed; *Maharajah Kooar Singh v. Nund Lall Singh*, 8 Moo. I. A. 199, distinguished.

**Pre-emption.—Purchase-money.**—In suits for pre-emption, where the amount of the consideration for the sale is in dispute, the rule as to the burden of proof is that, in the first instance, the plaintiff who alleges the price stated in the deed of sale to be fictitious must give some *prima facie* evidence leading to the presumption that the price so stated was not the true price. Having done that, it then lies upon the vender and vendee to give such an explanation by evidence as will go to rebut the presumption raised by the plaintiff's evidence—*Sheopargash Dube v. Dhunraj Dube*, I. L. R. 9 All. 225; *Bhagwan Singh v. Mahabir Singh*, I. L. R. 5 All. 184, followed. *Vide* also *Tawakkul Rai v. Lachman Rai*, I. L. R. 6 All. 344.

**Putni Taluq, Sale of.—Publication of Notice.**—In a suit to set aside a sale of a putni taluq held under the provisions of sec. 8 of Reg. VIII of 1819, on the ground that the notices required by sub-section 2 of that section had not been duly published, it lies upon the defendant to show that the sale was preceded by the notices required by that sub-section, the service of which notices is an essential preliminary to the validity of the sale—*Haro Doyal Roy Chowdhary*

*v. Mahomed Gazi Chowdhary*, I. L. R. 19 Cal. 699. The following cases were followed : (1) *Maharajah of Burdwan v. Tarasundari Debi*, I. L. R. 9 Cal. (P. C.) 619 ; (2) *Mahomed Tamir v. Abdul Hakim*, I. L. R. 12 Cal. 67. But see *Suresh Chundra Mukhopadhyaya v. Akkori Singh*, I. L. R. 20 Cal. 746.

**Raj, indivisibility of.**—Where a party alleges a Raj to be indivisible, and that he is, as heir, entitled to succeed to the whole, the *onus* of proof is on him—*Ghirdharee Singh v. Koolahul Singh*, 6 W. R. (P. C.) 1.

**Rent Law.—Avoidance of Under-ténures.**—A purchaser of an under-tenure who seeks to enforce his rights under sec. 66 of the Rent Act is bound to show that the person whom he seeks to eject holds under an incumbrance that he is entitled to avoid—*Gorind Nath Shaha Chowdhuri v. G. M. Reily*, I. L. R. 13 Cal. 1. *Vide* also *Durga Prossunna Ghose v. Kalidas Dutt*, 9 C. L. R. 449.

**Rent Law.—Ejectment.**—*Vide* (1) *Forbes v. Mir Mahomed Hossein*, 12 B. L. R. 215 ; (2) *Sheikh Ashruf v. Ram Kisore Ghose*, 23 W. R. 289 ; (3) *Secretary of State for India v. Luchmeswar Singh*, I. L. R. 16 Cal. (P. C.) 223.

**Rent Law.—Enhancement of Rent.**—(a). In suits for enhancement of rent, where the tenant pleads that a portion of the land sought to be enhanced is held by him rent-free, the *onus* is on the tenant to prove *prima facie* that such portion of the land is so held by him—*Newaj Bundopadhyaya v. Kali Prossunno Ghose*, I. L. R. 7 Cal. 543. But see *Prem Chand Barik v. Brojonath Koondoo*, 10 W. R. 204.

(b). In a suit for enhancement of rent in respect of land which the defendant claimed to hold as a dependent taluq ; *held*, the *onus* was upon the zamindar to show that the land was included in the zamindari at the time of the premanent settlement—*Assanullah v. Bussarat Ali Chowdhary*, I. L. R. 10 Cal. 920.

**Rent Law.—Hereditary Tenures.**—The hereditary nature of a tenure or taluk may be presumed from evidence of long and uninterrupted enjoyment and of the descent of the tenure from father to son ; the *onus* to prove it lies upon the party who asserts the existence of such tenures. *Vide* (1) *Babu Gopal Lal Takur v. Teluk Chunder Rai*, 10 Moo. I. A. 191 ; (2) *Babu Dhanput Singh v. Guman Singh*, 11 Moo. I. A. 465 ; (3) *Raja Satta Sarun Ghosal v. Mohes Chunder Mittra*, 11 Moo. I. A. 268 ; (4) *Kuldip Narayan Singh v. The Government*, 14 Moo. I. A. 247 ; (5) *Mussumat Lukshi Kowar v. Rai Hari Krishna Singh*, 3 B. L. R. 227 ; (6) *Karunakar Mahati*



v. *Niladhri Chandri*, 5 B. L. R. 655; (7) *Naba Durga Dasi v. Dwarkanath Rai*, 24 W. R. 301; (8) *Brajanath Kundu Chowdhari v. Lukhi Narain Addi*, 7 B. L. R. 211; (9) *Collector of Trichinopoly v. Tekamani*, 14 B. L. R. 139; (10) *Salur Zamindar v. Pedda Pakir*, I. L. R. 4 Mad. 371.

**Rent Law.—Mokurruree Lease.**—In a suit by a mortgagee under a zur-i-peshgee mortgage, not only for possession, but also for setting aside a mukurruree lease, which was alleged to have been granted by the mortgagor prior to the mortgage, and under which the defendants had been in possession for some time in accordance with a Magistrate's order. *Held*, that the *onus* was on the plaintiffs to give some evidence to impeach the validity of the mokurruree; but this having been done, and a strong *prima facie* case made out, the *onus* was shifted, and it became incumbent on the defendants to show that the mokurruree was executed before the zur-i-peshgee, and that it was granted *bond fide* for a real consideration, and intended to be operative as between the mortgagor and the lessee—*Sham Narain v. The Administrator-General of Bengal*, 23 W. R. (P. C.) 111.

**Rent Law.—Substituted Notice.**—Where the only evidence in support of substituted service was the statement of the serving peon that he had searched for the tenant and could not find him; *held*, that such evidence was sufficient, under the terms of sec. 14 of the Rent Act, to throw the *onus* upon the defendant to show by cross-examination or otherwise that the search was not properly made—*Noor Ali Mian Khondkar v. Ashanullah*, I. L. R. 11 Cal. 608.

**Rent Law.—Trees on Occupancy-holdings.**—A zamindar claiming a right to the fallen wood of self-grown trees which had been growing on occupancy-holding must prove some custom or contract by which he is entitled to take such wood—*Nathan v. Kamla Kuar*, I. L. R. 13 All. 571. The case of *Deoki Nandan v. Dhian Singh*, I. L. R. 8 All. 467, distinguished.

**Resumption Suit.—Mal, Lakhiraj.**—(a). In a suit for resumption of lands where the defendants allege that the lands are *lakhiraj*, the *onus* is on the plaintiffs, in the first instance, to show that the lands are *mal*—*Narendra Narain Rai v. Bishun Chundra Das*, I. L. R. 12 Cal. 182; (*Bacharam Mondal v. Peary Mohan Banerji*, I. L. R. 9 Cal. 813, followed, and I. L. R. 6 Cal. 543 and I. L. R. 6 Cal. 666, distinguished). *Vide* also (1) *Koylash Kaminy Dassee v. Gokoolmoni Dassi*, I. L. R. 8 Cal. 230; (2) *Arfunnessa v. Peary Mohun Mukerji*, I. L. R. 1 Cal. 378; (3) *Parbati Churn Mookerji v. Raj Krishna Mukerji*, B. L. R. Sup. Vol. 162; (4) *Harihur Mukerji v. Madhav Chunder Babu*, 20 W. R. (P. C.) 459; (5) *Mahomed Akbur v. Mr. G. M. Reily*, 20 W. R. 447.

In the case reported in I. L. R. 1 Cal. 378, their Lordships dissented from the following cases : (1) *Forbes v. Sheikh Mean Jan*, 3 W. R. 69 ; (2) *Shamlol Ghose v. Sekunder Khan*, 3 W. R. 182 ; (3) *Nobolol Khan v. Adhardni Narain Koonwari*, 5 W. R. 191.

(b). Where it is admitted that the defendants hold certain lands within the plaintiff's zamindari, some at least of which are rent-paying, the defendants, if desirous of proving that any of these lands are rent-free, are bound to give some *prima facie* evidence of the fact before they can call upon the plaintiff, the zamindar to prove that the whole or any part of the lands are *mal*—*Akbur Ali v. Bhyea Lal Jha*, I. L. R. 6 Cal. 666.

(c). In a suit to assess land which defendant proves that he purchased as *lakhiraj*, and of which he is in possession, the *onus* of proving that it is rent-paying lies on the plaintiff—*Rajkisore Mookerji v. Hurikur Mookerji*, 10 W. R. 117.

**Rent Law.—Transferability of Tenures.**—(a). In a suit brought to recover possession of certain lands forming part of the putni estate of the plaintiffs and constituting the ryoti holding of one M., which lands were sold in execution of a money-decree against M. and purchased by the defendant, the defendant set up that the tenure held by M. was of a permanent and transferable nature. *Held*, that the *onus* of proving the transferability of this tenure was upon the defendant—*Kripamoyi Dabia v. Durga Govind Sirkar*, I. L. R. 15 Cal. 89. The following cases were referred to with approval : (1) *Perhlad Sen v. Doorga Persaud Tewari*, 12 Moo. I. A. 322 ; (2) *Suhodwa v. Smith*, 20 W. R. 138 ; (3) *Ram Moni Mohurir v. Aleemoddeen*, 20 W. R. 374 ; (4) *Behari Sahoo v. Puryag Mahtoon*, 23 W. R. 291 ; (5) *Rajkishen Mookerji v. Peary Mohan Mookerji*, 20 W. R. 421 ; (6) *Hyes v. Moneerooddeen Ahung*, 24 W. R. 6 ; (7) *Betai Ahir v. Bhuggobutty Koer*, 11 C. L. R. 876. The case of *Doya Chand Shaha v. Anund Chunder Sen*, I. L. R. 14 Cal. 382, was dissented from.

(b). *Vide Thiagaraja v. Giyana S. P. Sannadhi*, I. L. R. 11 Mad. 77.

**Rent Law.—Yearly Tenant.**—*Vide* (1) *Endar Lala v. Lallu Huri*, 7 Bom. A. C. 111 ; (2) *Vasudeba Patruda v. Sanyasiras P. Simhulu*, I. L. R. 3 Mad. 1.

**Revenue Sale Law.**—The *onus* of proving that under-tenures in a taluk sold at a revenue sale under Act XI of 1859 fall under any of the exceptions to sec. 37 of that Act is on the person alleging the under-tenures to be within such exceptions—*Rash Behari Bosu v. Hara Moni Debia*, I. L. R. 15 Cal. 555.

**Sir-land.**—Where a person, whose proprietary rights in a mehal have been sold in execution of a decree, alleges that land held by him at the time of such sale was held as *sir*, the burden of proof lies on him—*Haridas v. Ghansham Narain*, I. L. R. 6 All. 286.

**Shikmee Taluq.**—Lands situate within a zamindari must *prima facie* be considered as part of the zamindari; and it is for those who insist on the separation of lands from the general lands of the zamindari, and on their settlement as a shikmee taluq, to establish their title—*Wise v. Bhoobun Moyee Debia*, 3 W. R. (P. C.) 5. *Vide also Nistarini v. Kali Persaud Das Chowdhari*, 23 W. R. 431.

**Threats.—Undue Influence.**—In the case of *The Zamindar of Ramnad v. The Zamindar of Yettiapooram*, 7 Moo. I. A. 441, their Lordships of the Privy Council remarked: "It has been said that if the zamindar did give his consent to the arbitration, it was not a willing consent, but was obtained by threats and through undue influence exerted by persons in authority. Now the *onus probandi* of an averment of this description must necessarily fall on those who make it."

**Vatandar Joshi.**—The burden of proving that the *Vatandar Joshi* of village is not entitled to officiate and take fees in the family of any particular caste lies upon the person or persons asserting exemption—*Raja Valad Shivapa v. Krishnabhat*, I. L. R. 3 Bom. 232.

**Will.—Insanity.**—When a will duly signed and attested is impugned in the Court of Probate, on the ground of the testator's insanity, the burden of proof lies on the impugner; when, however, it is shown that the testator was insane or subject to delusions at any time prior to the date of the will, or within a few years after that date, the burden of establishing his capacity to have made the will in question is shifted on to the propounding party—*Smee v. Smee*, L. R. 5 P. D. 84; *Prinsep v. Dye Sombre*, 10 M. P. C. 232. The *onus* of proving insanity is placed on the impugner, because every man may reasonably be presumed to be sane till the contrary is shown.

**Will.—Revocation of.**—(a). A will duly executed is not to be treated as revoked, either wholly or partially, by a will which is not forthcoming, unless it is proved by clear and satisfactory evidence that the later will contained either words of revocation or dispositions so inconsistent with the dispositions of the earlier will that the two cannot stand together. It is settled that the burden of proof lies upon the person who challenges the will that is in existence—*Shahib Mirza v. Umda Khanam*, I. L. R. 19 Cal. 444.

(b). Where revocation of probate is prayed for under sec. 234 of the Succession Act, on the ground that citation was not duly published, and that petitioner being a minor under the care of the person who obtained probate, did not understand his fraud, it was held that the petitioner should be allowed an opportunity of proving these allegations; and if she succeeded, there should be a new trial as to the *factum* of the will, which the person propounding would have to prove in the ordinary way—*Dintarini Debi v. Daibo Chunder Rai*, I. L. R. 8 Cal. 880.

104. The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Burden of proving fact to be proved to make evidence admissible.

### *Illustrations.*

(a). A wishes to prove a dying declaration by B. A must prove B's death.

(b). A wishes to prove, by secondary evidence, the contents of a lost document. A must prove that the document has been lost.

*Vide sec. 136 post.*

105. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

Burden of proving that case of accused comes within exceptions.

### *Illustrations.*

(a). A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act. The burden of proof is on A.

(b). A, accused of murder, alleges that, by grave and sudden provocation, he was deprived of the power of self-control. The burden of proof is on A.

(c). Section three hundred and twenty-five of the Indian Penal Code provides that whoever, except in the case provided for by section three hundred and thirty-five, voluntarily causes grievous hurt, shall be subject to certain punishments. A is charged with voluntarily causing grievous hurt under section three hundred and twenty-five. The burden of proving the circumstances bringing the case under section three hundred and thirty-five lies on A.

**Purport of the Section.**—(a). It is a settled rule in criminal cases that the accused must be presumed to be innocent until proved to be guilty; and consequently the *onus* of proving everything essential to the establishment of the charge against him lies on the prosecutor. But the *onus* may be shifted by legislative interference or by the admission of the accused. This section relieves the prosecution from the necessity of averring or proving the absence of circumstances which might constitute a general or special exception under the Indian Penal Code or any other law defining an offence. Now it is incumbent on the accused to prove the existence of circumstances which would show that the exceptive clause takes his case out of the danger of the law.

(b). Since the passing of the Evidence Act, it is incumbent on the accused, in all criminal cases tried in the mufassil, to prove the existence (if any) of circumstances which bring the offence charged within the general or special provisions contained in any part of the Penal Code or in any law defining such offence.—*In the matter of the Petition of Shiboo Prosaud Pandah*, I. L. R. 4 Cal. 124.

**Private Defence.**—In the case of *Jamsheer Sardar*, 1 C. L. R. 62, their Lordships remarked: "It is obvious that, under the provisions of the Evidence Act, sec. 105, an answer, setting up the right of private defence, must be supported by evidence, giving a full and true account of the transaction from which the charge against an accused person arises. No accused person can at the same time deny committing an act and justify it. The law does not admit of justification by putting forward hypothetical cases; it must be by proof of the actual facts." But it seems to us that their Lordships, who decided the case of *Kalichurn Mookerji*, 11 C. L. R. 232, took a more rational view of the law. The accused in this case did not raise before the Magistrate the plea that he was acting merely in the exercise of the right of private

defence. The Judge on appeal held that the complainants had themselves been the aggressors, and that the accused had merely exercised the right of private defence; but inasmuch as the accused had not set up the plea of private defence before the Magistrate, the conviction could not be set aside. The High Court held that such an argument was clearly untenable. Their Lordships remarked: "It is true that sec. 105 of the Evidence Act placed on the accused the burden of proving that in any criminal trial, they acted within their legal rights in the exercise of the right of private defence of property, still this burden can be discharged by the evidence of witnesses for the prosecution, as well as by evidence for the defence on such a plea being set up; and the accused are clearly entitled to claim an acquittal if, on the evidence for the prosecution, it is shown that they have committed no offence."

106. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Burden of proving fact especially within knowledge.

### *Illustrations.*

(a). When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b). A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

**Reason of the Rule.**—"The law, says one of our old books, will not force a man to show a thing which, by intendment of law, lies not within his knowledge. From the very nature of the question in dispute, all or nearly all the evidence that could be adduced respecting it must be in the possession of, or be easily attainable by, one of the contending parties, who, accordingly, could at once put an end to litigation by producing that evidence, while the requiring his adversary to establish his case, because the affirmative lay on him, or because there was a presumption of law against him, would, if not amounting to injustice, at least be productive of expense and delay. In order to prevent this, it has been established, as a general rule of evidence, that the burden of proof lies on the person who wishes to support his case by a particular fact which lies more peculiarly within his own knowledge, or of which he is supposed to be cognizant.—Best on Evi. (8th Ed.) 265.

Mr. Taylor says: "The Legislature has adopted a principle which the common law also recognises, and which may here be noticed, as a second exception to the general rule, that the burthen of proof lies on the party who substantially alleges the affirmative. The exception is this, that where the subject-matter of the allegation lies peculiarly within the knowledge of one of the parties, that party must prove it, whether it be of an affirmative or a negative character, and even though there be a presumption of law in his favour."—Evi. (6th Ed.) 384. In the case of *Greedhur Hurree v. Kalleekant Roy*, 11 W. R. 501, Mr. Markby J. questioned the principle inunciated by Mr. Taylor. He said: "But on referring to another work on the same subject (Best on Evidence, sec. 270), I find that the principle of law which Mr. Taylor has laid down is discussed at great length, and very great doubt is thrown upon it by that learned author. I think he might have gone further than express a doubt, for I find that in a case which he quotes, it has been expressly repudiated. That was a case where the plaintiff alleged that the defendant had hired a house from him, and had bound himself to keep the house insured from fire in some Insurance Office in or near London, and alleged forfeiture by breach of the said covenant. The plaintiff proved the contract but produced no evidence of the omission to insure, but he relied upon the same supposed rule of law that has been relied upon in this case. Lord Denman C. J., in delivering the judgment, distinctly repudiated any such doctrine. He says that the proof may be difficult where the matter is peculiarly within the knowledge of the defendant, but that does not vary the rule of law. It therefore seems to me that the principle laid down by Mr. Taylor is not a principle of law as it is administered in England, nor do I think that it is a correct principle here."

**Bailment.**—(a). The question of the burden of proof in case of accidental injury to goods bailed depends upon the particular circumstances of each case. In some cases, from the nature of the accident, it lies upon the bailee to account for its occurrence, and thus to show that it has not been caused by his negligence. In such cases it is for him to give a *prima facie* explanation in order to shift the burden of proof to the person who seeks to make him liable. If he gives an explanation which is uncontradicted by reasonable evidence of negligence, and is not *prima facie* improbable, the Court is bound in law to find in his favour, and the mere happening of the accident is not sufficient proof of negligence—*Shields v. Wilkinson*, 1. L. R. 9 All. 398.

(b). There must be reasonable evidence of negligence. But when the thing is shown to be under the management of the defendant

or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care—*Scott v. The London Dock Company*, 3 H. and C. 596; 34 L. J. Exch. 220.

(c). The mere happening of an accident is not sufficient evidence of negligence to be left to the jury, but the plaintiff must give some affirmative evidence of negligence on the part of the defendant—*Hammack v. White*, 11 C. B. (N. S.) 588; 31 L. J. C. P. 129.

(d). Refer to (1) *Davey v. The London and South-Western Railway Co.*, 12 Q. B. D. 70; (2) *Cotton v. Wood*, 8 C. B. (N. S.) 568; 29 L. J. C. P. 333; (3) *Collins v. Bennet*, 46 New York Rep.; (4) *Mansouri v. Douglas*, 6 Q. B. D. 145.

**Other instances.**—(a). “For instance, where a hawker or pedlar stands charged with trading without a license, it is easy for him to produce his license, and so end the discussion, whereas it may throw the most serious impediment in the way of the prosecutor if he were bound to prove that the hawker was not licensed. So in an action for practising as an apothecary without a certificate, the defendant must produce his certificate. So on a charge of selling ale without a license; so in many old cases on the game laws for shooting without a qualification.”—Norton on Evi., 298.

(b). In a suit to enforce the right of pre-emption, in which the plaintiff impugns the correctness of the price stated in the instrument of sale, although the burden of proof, *prima facie*, is on him to show that the property has in fact been sold below the stated price, yet very slight evidence is ordinarily sufficient to establish his case; and when such case is established, it rests upon the defendants, the vendor and vendee to prove by cogent evidence that the stated price is the correct one—*Bhagwan Singh v. Mahabir Singh*, I. L. R. 5 All. 184. (The principle laid down by the Privy Council in *Rajah Kishen Dutt Ram Panday v. Narendar Bahadoor Singh*, L. R. 3 I. A. 85, applied).

(c). In an action for penalties against the proprietor of a theatre for performing a drama without the consent of the author, the *onus* of proving consent lies on the defendant—*Morton v. Copela*, 24 L. J. C. P. 169.

(d). In an action against an apothecary for practising without a certificate, the apothecary must prove his certificate—*The Apothecaries Company v. Bentley*, R. and M. 159.



(e). The defendant objected that certain *daghs* were not held under the plaintiff, and that it was the duty of the plaintiff to show of what his tenure consisted. But it was held that when a ryot is holding lands of considerable extent under a zamindar, it is a matter peculiarly within his own knowledge of what that holding consists; and if he alleges that one or two plots occupied by him are held under a different title, it is for him to show it—*Ram Coomar Roy v. Beejoy Govind Bural*, 7 W. R. 535.

(f). In a suit against a zamindar to reverse the sale of a putni tenure held under Reg. VIII of 1819 on the ground of non-service of notice, the *onus* of proving service lies on the defendant, because the fact is especially within his knowledge—*Doorga Charn Surma Chowdhary v. Syud Nojunooddeen*, 21 W. R. 397. *Vide* also (1) *Maharajah of Burdwan v. Tara Sundari Debi*, I. L. R. 9 Cal. (P. C.) 619; (2) *Mahomed Zinur v. Abdul Hakim*, I. L. R. 12 Cal. 67; (3) *Hurro Doyal Roy Chowdhary v. Mahomed Gazi Chowdhary*, I. L. R. 19 Cal. 699.

**Instruments apparently altered and suspicious.**—In an ordinary case the person who presents an instrument which is an essential part of his case, in an apparently altered and suspicious state, must fail from the mere infirmity or doubtful complexion of his proof, unless he can satisfactorily explain the existing state of the document. But this wholesome rule admits of exceptions, if there be, independently of the instrument, corroborative proof strong enough to rebut the presumption which arises against an apparent and presumable falsifier of evidence. And such corroborative proof will be greatly strengthened if there be reason to suppose that the opposite party has withheld evidence which would prove the original condition and import of the suspected document—*Mussamut Khoob Koonwar v. Baboo Moodnarian Singh*, 1 W. R. (P. C.) 36.

**Material Alteration.**—*Vide* (1) *Gogun Chunder Ghose v. Dhurondhar Mundul*, I. L. R. 7 Cal. 616; (2) *Mohes Chunder Chatterji v. Kamini Kumari Dabia*, I. L. R. 12 Cal. 313; (*Sitaram Krishna v. Dayi Davaji*, I. L. R. 7 Bom. 418, dissented from); (3) *Kali Kumar Ray v. Gunga Narain Dutta Ray*, 10 W. R. 250. (This decision is inconsistent within the decision reported at page 313, I. L. R. 12 Cal.); (4) *Christacharlu v. Kalibasayya*, I. L. R. 9 Mad. (F. B.) 399; (5) *Goomdasami v. Kuppusami*, I. L. R. 12 Mad. 239; (6) *Paramma v. Ram Chundra*, I. L. R. 7 Mad. 302; (7) *Isac Mahomed v. Bai Fatma*, I. L. R. 10 Bom. 487 (material alteration made after execution does not vitiate a deed if it be made with the consent of all the parties); (8) *Gangaram v. Chandan Singh*, I. L. R. 4 All. 62; (9) *Oodey Chind Boolugi v. Bhaskar Jugonnath*, I. L. R. 6 Bom. 371.

Burden of proving death of person known to have been alive within thirty years.

107. When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

*Vide notes to section 108 post.*

Burden of proving that person is alive who has not been heard of for seven years.

108. Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it.

**Principle of the Rule.**—The principle on which the Court presumes the death of a person of whom no tidings have been received for a long period of time, is this: “that *if he were living, he would probably have communicated with some of his friends and relatives.* It is a conclusion which the Court draws from the probabilities of the case. It is quite clear, therefore, that *when no such probability exists, the presumption cannot arise.*” *Vide* the remarks of Vice-Chancellor Stuart, in *Bowden v. Henderson*, 2. Sm. and Gif. 336.

*Absence* means absence from some particular place as, for instance, the residence or place of resort of the party when last at home, in short the place where he could be likely to be known. *Tidings* must be with reference to some person or persons. *Members*, for instance, of the family or friends, with whom communication might be expected to have taken place, had the party been in fact living.—Goodeve on Ev., 601.

The true proposition is that those who found a right upon a person having survived a particular period must establish the fact affirmatively by satisfactory evidence. The evidence will necessarily vary in different cases, but sufficient evidence there must be, or the person asserting title will fail.—*Phene's Trust*, L. R. 5 Ch. 139.

**Instances.**—(a). The question whether a man be alive or dead is one simply of evidence and has no immediate connection with the devolution of property under the Hindu or Mahomedam law, and its determination should follow the rules of evidence in Act I of 1892.

When a person is claiming the estate of a missing person, he could not do so if a Hindu, until after the expiration of twelve years from the date of that person's forsaking his family, and being lost sight of, or if a Mahomedan, until ninety years had passed from the date of the missing person's birth—*Parmeshar Rai v. Bishesar Singh* I. L. R. 1 All. (F. B.) 53. *Vide* also (1) *Hassan Ali v. Mahrbab*, I. L. R. 2 All. 625 ; (2) *Dhondo Bhikaji v. Ganesh Bhikaji*, I. L. R. 11 Bom. 433 ; (3) *Balayya v. Kistnappa*, I. L. R. 11 Mad. 448 ; (4) *Dharup Nath v. Govind Saran*, I. L. R. 8 All. 614.

(b). The rule contained in this section governs the case of a Mahomedan, who has been missing for more than seven years, when the question of his death arises in cases to which, under the provisions of sec. 24 of Act VI of 1871 (Bengal Civil Courts Act), the Mahomedan law is applicable—*Mazhar Ali v. Budh Singh*, I. L. R. 7 All. (F. B.) 297.

(c). Plaintiffs having insured the life-interest of one H. with the defendant insurance company for the better security of certain advances to H., and H. not having been heard of for seven years ; *held*, that H. must be taken to be dead, and that the plaintiffs were entitled to the amount of the life-policy and bonuses—*Willyams v. Scottish Widows*, 52 J. P. 471.

**Time of Death.**—(a). Where a party has been absent for seven years, without having been heard of, the only presumption arising is that he is dead ; there is no presumption as to when, in the seven years, he died. And if it be sought to establish the precise time of such person's death, this must be done affirmatively, by evidence of some sort beyond the mere fact that seven years have elapsed since such person was last heard of.—*Best on Ev.*, 8th Ed., 367.

(b). Secs. 107 and 108, taken together, do not lay down any rule as to the exact time of the death of a missing person. Whenever the question as to the exact time of death arises, it must be dealt with according to the evidence and circumstances of each case, when the death is alleged to have occurred at any time not affected by the presumption of law as to the seven years—*Dharup Nath v. Govind Saran*, I. L. R. 8 All. 614.

**Hindu and Mahomedan Law.**—(a). The Hindu law presumes the death of a person of whom nothing has been heard for twelve years, or at Benares, fifteen years ; the Mahomedan law presumes the death of a missing person ninety years, after his birth. These rules, being rules of evidence, have been superseded by the Evidence Act.

(b). Where a Hindu disappears and is not heard of for a length of time, no right accrues to any person as his heir until after

expiry of twelve years from the date on which he was last heard of—*Junmajoy Mazoomdar v. Keshub Lal Ghose*, 10 W. R. 484. This case was decided before the passing of the Act.

(c). Where the husband is unheard of for the prescribed number of years, the mere omission of ceremonies being performed by his wife will not prevent the presumption of death from arising—*Ghose v. Josode*, 2 Agra Rep. A. C. 226.

109. When the question is whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it.

Burden of proof as to relationship in the cases of partners, landlord and tenant, principal and agent.

**Purport of the Section.**—"This section merely applies to three common and important relationships,—partnership, landlord and tenant, and principal and agent,—the general presumption based on the continuance of human affairs in the state in which they are once shown to be. When, therefore, the existence of a relationship or state of things is once proved, the law presumes that it continues till the contrary is shown or some other presumption arises. On this principle, it has been held in England that where a custom was found to have existed up to 1689, it must, in the absence of any evidence of its discontinuance, be presumed to exist in 1840. On the same grounds, a partnership shown to have existed in 1816, was presumed, in the absence of evidence to the contrary, to be in existence in 1838. The Contract Act, 1872, contains special provisions, secs. 208 and 264, as to the mode in which the termination of the agency or partnership must be notified to persons who know of the relationship. The same presumption in favour of the continuance of a state of things, once shown to exist, is of general application. . . . On the same principle, where a partnership or tenancy continues after the expiry of the original period, it is presumed that the same terms and conditions govern it, Contract Act, sec. 256."—Cung. Ev., 283. The provisions contained in this section are founded on presumptions arising from the experienced continuance of human affairs.

**Agency.**—*Vide* Chapter X, secs. 182—238 of the Indian Contract Act, IX of 1872—*Dinomoyi Debi Chowdhurani v. Luchmiput Singh Bahadur*, 6 C. L. B. (P. C.) 101.

**Butwara.**—The plaintiffs being the owners of a 4-annas share and the defendant No. 2 the owner of the remaining 12-annas share in an estate, the latter granted a putni of their undivided share to the defendant No. 1, and subsequently a private partition was effected, under which certain lands were appropriated to the plaintiffs as their 4-annas share, and the zemindar to the putnidars as representing their 12-annas share. Under this partition, the putnidars held possession for about forty years, when, on a butwara, to which they were not parties, being effected by the Collector, a different division of the estate was made, and the plaintiffs sued to obtain possession of such portion of the estate, allotted to them under the butwara as was in the hands of the putnidars, alleging that the private partition was meant to be temporary only, and was liable to be determined on a butwara being effected. *Held*, by the majority that the *onus* was upon the plaintiffs to show that the arrangement under the private partition had determined, because they sought to disturb the existing state of things—*Obhoy Churn Sircar v. Hari Nath Roy*, 1. L. R. 8 Cal. 72.

**Landlord and Tenant.**—(a). When the relationship of landlord and tenant has once been proved to exist, the mere non-payment of rent, though for many years, is not sufficient to show that the relationship has ceased; and a tenant who is sued for rent and contends that such relationship has ceased, is bound to prove that fact by some affirmative proof, and more especially is he so bound when he does not expressly deny that he still continues to hold the land in question in the suit—*Bungo Lal Mundul v. Abdool Gufoor*, 1. L. R. 4 Cal. 314. *Vide* also (1) *Mohun Mahtoo v. Meer Shumsool Hoda*, 21 W. R. 5; (2) *Parbutti Dassi v. Ram Chand Bhuttacharji*, 3 C. L. R. 576; (3) *Dattatraya Rayajipai v. Sridhar Narayan Rai*, 1. L. R. 17 Bom. 736; (4) *Ograkant Chowdhari v. Mohesh Chunder Shikdar*, 4 C. L. R. 40.

(b). Where the relation of landlord and tenant is proved to have existed, it lies on the defendant in possession of the land to prove that the relation was put an end to at such a period anterior to the suit, as would entitle the defendant to rely on his possession as adverse to the plaintiff for twelve years. Non-payment of rent for upwards of twelve years, and a grant of pattah by Government to defendant for five years, do not, when Government claims no interest adverse to plaintiff and plaintiff does not consent to defendant becoming tenant to Government, create any possession in defendant adverse to plaintiff—*Tiruchurna Perumal Nadan v. Sanguvien*, 1. L. R. 3 Mad. 118.

**Partnership.**—*Vide* Chapter XI, secs. 239-266 of the Indian Contract Act, IX of 1872.

110. When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

Burden of proof as to ownership.

**Purport of the Section.**—The principle here formulated only gives effect to a well-known principle of law common to all systems of jurisprudence, that possession is *prima facie* evidence of title. In the words of Cockburn C. J., “possession is good against all the world except the person who can show good title.” Seisin or possession of land, if once proved to exist in a particular person, may be and often should be presumed to continue until the contrary is shown. Mr. Best says ‘where seisin of an estate has been shown, its continuance will be presumed.’ Proof of possession is presumptive proof of ownership, because men generally own the property which they possess. It may, with equal reason, be said, that if the ownership of property is proved, and there is nothing to show that the possession of such property is with any person other than the owner, it may fairly be presumed to be with the owner. Such a presumption generally arises in cases in which evidence of actual possession is impossible, as of lands incapable of cultivation, jungle or waste lands, and lands under water. In such cases, all the proof that can commonly be given is to show possession taken or acts of ownership done at some time, which possession will, in law, continue until the possessor by his conduct shows that he means to relinquish his possession, or he is excluded by some one else. But this is only a rebuttable presumption, and one which is entitled to more or less weight, according to the circumstances of each case.\*

**Possession.**—Physical possession is a pure matter of fact, and there is nothing peculiar about it; but in order that it may generate ownership, it is necessary that the possessor should hold the thing exclusively, and *for himself as owner*. The exclusive holding is a physical fact; when it is united with the intention to hold for himself as owner, it becomes such as will generate a title by prescription. When there is an intention to hold a thing as owner, it is not necessary that it should be enjoyed in any particular way, but it is sufficient that some overt act is done upon the thing in the execution of such intention.

Possession is not necessarily the same thing as actual user. The nature of the possession is to be looked for and the evidence of its continuance must depend upon the character and condition of the

\* *Vide* *Mano Mohun Ghose v. Mathura Mohun Roy*, 1. L. R. 7 Cal. 225.

land in dispute. Land is often either permanently incapable of actual enjoyment in any of the customary modes as by residence or tillage or receipt of a settled rent. It may be incapable of any beneficial use, as in the case of land covered with sand by an inundation ; it may produce some profit, but trifling in amount, and only of occasional occurrence as is often the case with jungle land. In such cases it would be unreasonable to look for the same evidence of possession as in the case of a house or cultivated field. All that can be required is that the plaintiff should show such acts of ownership as are natural under the existing condition of the land, and in such cases when he has done this, his possession is presumed to continue as long as the state of the land remains unchanged, unless he is shown to have been dispossessed. Lands again may, by natural causes, be caused wholly out of the reach of their owner, as in the case of diluvion by a river. In such a case if the plaintiff shows his possession down to the time of the diluvion, his possession is presumed to continue as long as the lands continue to be submerged—*Kally Charun Sahoo v. Secretary of State for India*, I. L. R. 6 Cal. 725 ; *Mano Mohun Ghose v. Mothura Mohun Roy*, I. L. R. 7 Cal. 225. When lands, which have been in such a condition as to be incapable of enjoyment in the ordinary modes, are reclaimed and brought under cultivation, the change is in many instances gradual and difficult of observation while in progress. Diluviated land may take years to reform. Jungle land is often brought under cultivation furtively by squatters clearing a patch here and a patch there at irregular intervals of time. So that it may be a matter of extreme difficulty to prove as to any piece of land, the exact date at which its condition became altered. And as the plaintiff, who has complied with the conditions we have indicated, is in the absence of dispossession presumed to continue in possession as long as the state of the land remains unchanged, it is essential to enquire on whom the burden of proof of the date of the change lies. The true rule appears to us to be this. That where land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes at such a time, and under such circumstances that that state naturally would, and probably did, continue till within twelve years before suit, it may properly be presumed that it did so continue, and that the plaintiff's possession continued also, until the contrary is shown. This presumption seems to us to be reasonable in itself, and in accordance with the legal principles now embodied in sec. 114 of the Evidence Act. *Vide* remarks of Wilson J., in *Mahomed Ali Khan v. Khaja Abdul Gunny*, I. L. R. 9 Cal. (F. B.) 744.

Where land, the right to which is disputed, has been uninhabited and uncultivated, and no acts of ownership by any person can be

proved to have been exercised over it, it is often necessary for the purpose of deciding the question of limitation, to rely upon slight evidence of possession, and sometimes possession of the adjoining land, coupled with the evidence of title, such as grants or leases, and the Courts are justified in presuming under such circumstances that the party who has the title has also the possession.\*

In the cases mentioned below, the proposition was affirmed that proof of quiet possession at the time of disturbance is enough to establish a *prima facie* case against a trespasser—(1) *Khajah Enayet-ullah Chowdhary v. Kishen Sunder Surma*, 8 W. R. 386; (2) *Ayesha Bibi v. Kanaya Mollah*, 12 W. R. 146; (3) *Dabji Saboo v. Sheikh Tameezooddeen*, 10 W. R. 102; (4) *Mahomed Bux v. Abdool Kareem*, 20 W. R. 458; (5) *Ram Chundra Chowdhary v. Brojo Nath Sarma*, 3 B. L. R. App. 109; (6) *Pemraj Bhabaniram v. Naryan Shivaram Khisti*, I. L. R. 6 Bom. (F. B.) 215; (7) *Krishnarav Yashwant v. Vasudeb Apaji Ghotikar*, I. L. R. 8 Bom. 371; (8) *Mohabir Pershad v. Mohabeer Singh*, I. L. R. 7 Cal. 591; (9) *Brojo Sunder Gossami v. Koylash Chunder Kur*, 11 C. L. R. 133; (10) *Lachho v. Hur Shahoi*, I. L. R. 12 All. 46; (11) *Shama Soondari Debi v. The Collector of Maldah*, 12 W. R. 164; (12) *Trilochun Ghose v. Koylash Nath Bhuttacharji*, 12 W. R. 175; (13) *Gour Paroy v. Wooma Sundari Debi*, 12 W. R. 472; (14) *Daitari Mahanti v. Juggobundhu Mahanti*, 23 W. R. 293.

But a contrary view has been taken in the cases noted below. In them it has been laid down that "mere previous possession will not entitle a plaintiff to a decree for the recovery of possession except in a suit under sec. 9 of the Specific Relief Act, 1877, which must be brought within six months from the date of dispossession"—(1) *Parmeshur Chowdhary v. Brojolal Chowdhary*, I. L. R. 17 Cal. 256; (2) *Ertaza Hossein v. Beni Mistry*, I. L. R. 9 Cal. 130; (3) *Debi Charan Boido v. Issur Chunder Manji*, I. L. R. 9 Cal. 39; (4) *Kawa Manji v. Khawas Nussio*, 5 C. L. R. 278 (view taken by Mr. Justice Prinsep). These cases were all founded upon a passage in the judgment of their Lordships in *Wise v. Ameerunnissa Khatoon*, L. R. 7 I. A. 73. *Vide also* (5) *Ameer Bibi v. Tukroonnissa Begum*, 7 W. R. 332; (6) *Montavi Maenooddin v. Grish Chunder Rai Chowdhary*, 7 W. R. 230; (7) *Chunder Monee Chowdhraim v. Rajkishore Shaha*, 5 W. R. 246.

**Possession.—Conflicting Evidence of.**—"In the midst, therefore, of this conflicting evidence, their Lordships think it right to consider whether there is any presumption to be derived from the other parts of the case in favour of the one side or the other. Now the ordinary

\* *Vide Mohim Chandra Dey Sarkar v. Harrolal Sarkar*, I. L. R. 8 Cal. 708.



presumption would be that possession went with the title. The presumption cannot, of course, be of any avail in the presence of clear evidence to the contrary ; but where there is strong evidence of possession, as there is here on the part of the respondents, opposed by evidence apparently strong also on the part of the appellant, their Lordships think that, in estimating the weight due to the evidence on both sides, the presumption may, under the peculiar circumstances of this case, be regarded ; and that with the aid of it, there is a stronger probability that the respondents' case is true than that of the appellant." *Vide Runjeet Panday v. Goberdhun Rani Panday*, 20 W. R. 25. See also *Dharm Singh v. Har Pershad Singh*, I. L. R. 12 Cal. 38.

**Possession.—Beel Lands.**—A originally owned two zemindaries between which lay a *beel*, or marsh, of which he also owned the fishery. One of the zemindaries was sold and purchased by B, but the *beel* fishery still continued with the remaining zemindary held by A. After the sale, certain lands reclaimed from the *beel* were, for some years, held by B as part of his purchased zemindary. A instituted a summary suit under Act IV of 1840, and was, by an order of the Magistrate, put in possession of these lands. B brought a regular suit against A to recover the lands, and set aside this order. *Held*, (reversing the decisions of the Courts below) that it was necessary for B to show a better title to the land than A could produce. It was not enough for him to prove possession anterior to the Magistrate's order under Act IV of 1840. The presumption was that the land of the *beel* belonged to A, who had admittedly owned both estates before, and had retained the fishery of the *beel* after the auction-sale. B ought to have shown when and how, if at all, the right to the fishery and the right to the soil were severed—*Raja Burdacant Roy v. Baboo Chunder Coomar Roy*, I. L. R. 12 Moo. I. A. 145.

**Possession.—Diluviated Lands.**—(a). In the case of lands gradually diluviated and gradually reformed, if the diluviation has been more than twelve years before suit, the claimant, unless he can show possession since the reformation, must at least show that he was in possession down to the date of the diluviation. When the true owner is in possession at the time of diluviation, his possession is presumed to continue as long as the land continues submerged, probably also afterwards until he is dispossessed. But the burden of proof would be upon the plaintiff to prove his case either by showing the dispossession to have been in fact within twelve years, or that the submergence has continued down to within twelve years, so that his possession cannot have been interfered with more than twelve years ago—*Mano Mohun Ghose v. Mathura Mohun Roy*, I. L. R. 7 Cal. 225.

This case followed *Kali Churn Sahu v. The Secretary of State*, 1. L. R. 6 Cal. 725 and *Radha Govind Ray Sahab v. Inglis*, 7 C. L. R. (P. C.) 364, and distinguished *Koomar Ranjit Singh v. Schoene, Kilburn & Co.*, 4 C. L. R. 390; *Gokool Kristo Sein v. David*, 23 W. R. 443; and *Mahomed Ibrahim v. Morrison*, 1. L. R. 5 Cal. 36.

(b). In the case of *Kali Churn Sahu v. The Secretary of State*, 1. L. R. 6 Cal. 725, it was held that where, in a suit for possession of jungle land or of land which has been diluviated and which is alleged to have been wrongfully taken possession of by the defendant, the plaintiff gives *prima facie* proof of his title, the *onus* is upon the defendant to show that he (the defendant) has acquired a statutory title by a twelve years' adverse possession which has put an end to the plaintiff's right. Garth C. J. remarked: "Now it seems to me very clear, that if the plaintiffs, in a case of this kind, could show that the land in question was in fact a part of their mouzah of which they had been in possession before it was diluviated, their possession must be considered in law as continuing during the time of the diluvion, and indeed until they were dispossessed by some other party. It is not because land becomes covered with water, and it therefore becomes difficult or impossible for the owner to turn it to any useful purpose, that it therefore ceases to be in the owner's possession. It seems to me that the possession of the owner in such a case must be deemed to continue during the diluvion, and until, in fact, he is proved to have been dispossessed by some other person, and I think that this view of the law is quite in accordance with *Loper's* case, 13 Moo. I. A. 467, and with the decision of the Privy Council in *Radha Prosad Singh v. Ram Coomar Singh*, 1 C. L. R. 259."

(c). The doctrine in *Loper's* case (13 Moo. I. A. 467) that diluviated lands, reforming on their old site, remain the property of their original owner, does not apply to lands in which, after their reformation, an indefeasible title has been acquired by long adverse possession or otherwise—*Radha Prosad Singh v. The Collector of Shahabad*, 1. L. R. 3 Cal. 796.

(d). *Vide Mohini Mohan Das v. Krishna Kissore Dutt Poddar*, 1. L. R. 9 Cal. 802.

**Possession.—Julkur.**—In a dispute about julkurs between the proprietors of neighbouring estates, where the title-deeds of the two parties do not specifically mention the particular piece of land or water in contest, the title of the parties must depend on the fact as to which of them has been in possession—*Shama Soondari v. The Collector of Maldah*, 12 W. R. 164.

**Possession as Mortgagee.**—(a). The plaintiff sued to redeem certain land, alleging that it had been mortgaged by his father to

the defendant in 1854-55. The defendant denied the mortgage, and alleged that he purchased it under a deed of sale from the plaintiff's father in 1849, and had ever since been in his possession as owner. The High Court held that : " According to sec. 110 of the Evidence Act, possession is *prima facie* evidence of a complete title ; any one who would oust the possessor must establish a right to do so ; and possession unexplained, held for twelve years, would, according to *Shambhubhai Karsandas v. Shirlaldas Sada Shivdas Desai*, I. L. R. 4 Bom. 89, itself constitute a complete title not qualified by an assertion of the holder that he purchased from this or that person. The assertion of ownership at all implies some lawful acquisition of title, and the effect of possession as owner cannot be impaired by the surplus statement that the holder acquired by the mode of acquisition most serviceable to a holder for a shorter period. Here the defendant Ram Chandra has held undoubtedly for about thirty years, and in such a case any one who, after the lapse of so long a time, comes forward seeking to make him a mere mortgagee, must prove his own right as mortgagor clearly and indefeasibly—*Ram Chundra Apaji v. Balaji Bhaurav*, I. L. R. 9 Bom. 137. *Vide* also (1) *Seraji Vijaya Raghunatha Valoji Krishnan Gopalkar v. Chinna Nayana Chetti*, 10 Moo. I. A. 151 ; (2) *Ratan Kuar v. Jiwan Singh*, I. L. R. 1 All. (F. B.) 194.

(b). There is a clear distinction as to the *onus* of proof between cases where a plaintiff sues for possession of land by redemption of mortgage and cases where the defence to a suit for possession of land is twelve years' adverse possession by the defendant. In each case the plaintiff must plead his title, and if that title is in issue, he must make it out by at least *prima facie* evidence before the defendant can be put to proof of his defence. When the defence is twelve years' adverse possession, the defendant must plead and make out the title he alleges, and thus show that the title of the plaintiff, which otherwise had been proved or admitted, was lost. In a suit for possession of land by redemption of mortgage, the very nature of which pre-supposes that the possession of the defendant or his predecessor was lawful, the plaintiff must, in his plaint, show the title upon which he relies, and therefore a title subsisting at the date of suit, unless he gives *prima facie* evidence to show that he is within time, he fails to prove his title or subsisting right to the property—*Purmanand Misr v. Sahib Ali*, 11 All. 438.

(c). In the case of *Servaji Vijaya Raghunadha Valoji Kristram Gopalar v. Chinna Nayana Chetti*, 10 Moo. I. A. 151, their Lordships of the Privy Council said : " A plaintiff who alleges that his ancestor, forty-four years ago, made a mortgage to the ancestor of the present

possessor of a property, and by virtue thereof seeks to dispossess the present possessor, must prove his case clearly and indefeasibly. He must succeed by the strength of his own title and not by reason of the weakness of the opponent's. It would be contrary to all principles of law and justice, that upon such an allegation a plaintiff should be able to require the present possessor to prove his title, and if he failed in doing so, to dispossess him of the land in question.

**Possession.—Road Land.**—Where the land along a path which at one time formed a public road, but is no longer used or required as such, belongs on one side to one party and on the other to another, and no evidence is offered by either of the parties, as to the site of the road being his property, the presumption is that it belongs to both the adjoining proprietors, half to one and half to the other up to the middle of the road—*Mobaruck Saha Fakeer v. Sheikh Toofani*, 2 C. L. R. 448.

**Possession without title and dispossession by a wrong-doer.**—(a). The plaintiff was in possession of the property in dispute for six years past without any title, and his possession was wilfully, improperly, and illegally interfered with by the defendant who had no title. The plaintiff claimed relief under sec. 42 of the Specific Relief Act. The High Court (Petheram C. J. and Norris and Beverley JJ.) dismissed the plaintiff's suit saying: "That sec. 42 was passed for the purpose of enabling persons who have a title, and whose title has been threatened, to bring an action for the purpose of having that title declared, but such an action seems to us to be absolutely inappropriate in cases in which the person has no title whatever, because we cannot give a declaration of something that is untrue, we cannot declare that this person, the plaintiff, has a title, when, as a matter of fact, it is shown he has none." Their Lordships of the Privy Council allowed the appeal against the judgment of the High Court observing: "The possession of the plaintiff was sufficient evidence of title as owner against the defendant. By sec. 9 of the Specific Relief Act (Act I of 1877), if the plaintiff had been dispossessed otherwise than in due course of law, he could, by a suit instituted within six months from the date of the dispossession, have recovered possession, notwithstanding any other title that might be set up in such suit. If he could thus recover possession from a person who might be able to prove title, it is certainly right and just that he should be able, against a person who has no title and is a mere wrong-doer, to obtain a declaration of title as owner, and an injunction to restrain the wrong-doer from interfering with his possession"—*Ismail Ariff v. Mahomed Ghous*, I. L. R. 20 Cal. (P. C.) 834.

(b). In the case of *Arumugam Chetti v. Perriyannan Servai*, 25 W. R. 81, their Lordships of the Privy Council held a view similar to the view expressed in *Ismail Ariff v. Mahomed Ghous*. They said : " Now, if the allegation of forcible dispossession had been made out, the case of the Nagarattas (the plaintiffs) would, no doubt, be an extremely strong one. It would probably have been inferred from the evidence that their possession up to the date of that forcible act had been consistent with the title which they alleged. But since they have failed to prove the dispossession alleged, we have to deal with a possession on the part of the defendants which is not shown to have commenced in wrong, and the plaintiff can only disturb that by proving distinctly a superior title."

**Instances in which proof of title was held necessary.**—(a). An order made under sec. 55 of Beng. Act VII of 1876 prevents the person against whom it is made from relying on his previous possession in a subsequent suit for confirmation of possession. An order made under sec. 52 of the same Act has not that effect—*Omrinissa Bibi v. Dilawar Ali Khan*, I. L. R. 10 Cal. 350. But see *Modan Mohan Poddar v. Bhogo Manto Poddar*, I. L. R. 8 Cal. 923.

(b). The plaintiff sought to recover possession of certain lands, alleging that he had been dispossessed. The defendants, who were in possession, alleged that, at an auction-sale, the plaintiff had bought the lands *benami* for the defendants. Held, that the burden of proving a *prima facie* case that the land belonged to the plaintiff was on him—*Hariram v. Rajcoomar Opadhya*, I. L. R. 8 Cal. 756.

(c). Where it was declared that the appellant having been put by the Court, in India, in possession of the property in dispute, and the respondents having been directed to bring a civil suit to assert their claim to such property, and having brought this suit accordingly, it was incumbent on the respondents to prove some title to such land before the appellant was called upon to make out his title—*Ram Rutton Rai v. Furrook-un-nissa Begum*, 4 Moo. I. A. 233.

(d). Where a party seeks to turn out another in possession of chur land, which the plaintiff claims as a part of a mehal purchased by him from Government, the suit is in the nature of an ejectment suit, and the plaintiff must recover upon the strength of his own title, and not upon the weakness of that of his adversary. It is immaterial in such a case to consider whether or not the land is the property of the defendant, because, unless it is proved to be the property of the plaintiff, the latter is not entitled to turn out the former—*Ranee Shornomoyee v. Watson & Co.*, 20 W. R. (P. C.) 211.

(e). In a case for recovery of possession after ouster in which the plaintiff is held to have a bad title, whilst the title of the defendant

in possession has not been enquired into, the plaintiff cannot oust the defendant in possession simply by proving anterior possession, but must prove title—*Musst. Jukroonnissa Begum v. Musst. Magul Jan Bibi*, 8 W. R. 370.

(f). One of the claimants in a case of disputed boundaries was in possession by virtue of a Magistrate's order made under Act IV of 1840, and it was held that it lay on the party seeking to oust him to show a better title to the land claimed than that of the party in possession—*Baradakanth Rai v. Chundra Kumar Rai*, 12 Moo. I. A. 145. *Vide also Kali Narain Basu v. Ananda Moyi Gupta*, 21 W. R. 79.

**Instances in which proof of title was held not necessary.**—(a). A suit for damages for the value of fruit-crops taken away by the defendant from a garden alleged to be in the plaintiff's possession, can be sustained on the finding that the plaintiff was in possession up to the date of the institution of the suit; it is not necessary for him to prove his title to the land, unless the plaintiff shows a better title—*Lep Singh Khasia v. Nimar Khasia*, I. L. R. 21 Cal. 244. *Vide also Ram Mohan Dass v. Jhuproo Dass*, 14 W. R. 41.

(b). The defendant in a suit for mesne profits had a right to have the question of title tried; but the prior possession of the plaintiff, to which he had been restored under the Act XIV decree, was sufficient *prima facie* evidence of his title to warrant a decree in his favor against the defendant for mesne profits unless she could prove a better title. *Vide* remarks of Sir Barnes Peacock C. J., in *Radha Charan Ghatak v. Zamirunnissa Khatun*, 11 W. R. 83.

(c). A zemindar has, as such, a *prima facie* title to the gross collections of all the mouzahs or villages within his zemindary, and the burden of proof is upon a person who seeks to defeat that right by proving that he is entitled to an intermediate tenure—*Prahlad Sen v. Durga Persad Tewari*, 12 Moo. I. A. 331.

(d). The above principle applies when the zemindar or an assignee or lessee of his rights demands possession of the land from a person who is unable to prove a tenancy or other right of continuing to occupy—(1) *Ram Main Mohurrir v. Alimuddin*, 20 W. R. 374; (2) *Rajkissheh Mukerji v. Piyari Mohan Mukerji*, 20 W. R. 421; (3) *Batai Ahir v. Bhagabati Koer*, 11 C. L. R. 476.

**Jote-tenancy.**—In a suit to recover possession of certain land described as *khas khamar*, of which plaintiffs had been forcibly dispossessed, defendants claimed to hold the land by way of permanent jote for forty years, and contended that plaintiffs had no right except to receive rents. *Held*, that as defendants admitted the ownership to be with the plaintiffs, and prayed to be allowed to hold possession under the jote-tenancy, the burden of proof lay with

the defendants—*Hurree Mohan Poddar v. Gurreeboollah Mullick*, 22 W. R. 417. *Vide* also decisions to be found in 19 W. R. 188 ; 20 W. R. 374.

111. Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.

Proof of good faith in transactions where one party is in relation of active confidence.

### *Illustrations.*

(a). The good faith of a sale by a client to an attorney is in question in a suit brought by the client. The burden of proving the good faith of the transaction is on the attorney.

(b). The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son. The burden of proving the good faith of the transaction is on the father.

**Purport of the Section.**—This section lays down the principle of English law which is applied in judging of the fairness of transactions between legal practitioners and their clients, medical practitioners and their patients, spiritual advisers and members of their congregations, trustees and their *cestui que* trust, and guardians and wards. In the case of *Sital Prasad v. Parbhu Lal*, I. L. R. 10 All. 535, Straight J. made the following observations :—“But what the Courts in this country will do is to see that where one person is so situated as to be under the control and influence of another, such other does not unduly or unfairly exercise that influence and control over such person for his own advantage or benefit, or for the advantage or benefit of some religious object in which he is interested, and will call upon him to give clear and cogent proof that the transaction complained of was such a one as the law would support and recognise. No doubt, there is one class of cases in which there being no fiduciary or *quasi* fiduciary relation between the parties, Courts of Equity have interfered with contracts into which the persons claiming relief have entered upon various grounds. But in such cases they have required that the parties seeking that relief should themselves establish their title to relief. On the other hand, where a fiduciary or *quasi* fiduciary relation had existed, Courts of Equity have always placed the burden of sustaining the transaction upon the party benefited by it, requiring

him to show that it was of an unobjectionable character, and one which it ought not to disturb." This principle is recognised in the law of evidence in this country and has been embodied in this section. In this country, the position of the women is such that a strict observance of this rule is urgently required, and the Courts would act rightly in throwing the burden of proving the good faith of the transaction between the parties, on the party who has been in the fiduciary position. The High Court in the case of *Kanye Lal Jahoree v. Kamini Dabi*, reported in the *Englishman* newspaper of March 28th, 1867, and referred to in *Roop Narain Singh v. Gudadher Pershad Narain*, 9 W. R. 297, said: "A Hindoo *purdanashin* woman is entitled to receive in this Court that protection which the Court of Chancery in England always extends to the weak, ignorant, and infirm, and to those who, for any other reason, are specially likely to be imposed upon by the exertion of undue influence over them. The undue influence is presumed to have been exerted unless the contrary is shewn. It is, therefore, in all dealings with those persons who are so situated, always incumbent on the person who is interested in upholding the transaction to show that its terms are fair and equitable. The most usual mode of discharging this *onus* is to shew that the lady had good independent advice in the matter, and acted therein altogether at armslength from the contracting party." The judgment then went on to add, "for the like reason, the same burden of proof lies on any one who standing before the Court in reliance upon a contract made with any one, whether *purdanashin* or other, towards whom he is in any fiduciary position relating to the subject of contract."

In the class of cases, *i.e.*, those which arise from some peculiar confidential or fiduciary relation between the parties, there is often to be found some intermixture of deceit, imposition, overreaching, unconscionable advantage, or other mark of direct and positive fraud. But the principle on which Courts of Equity act in regard thereto stands, independent of any such ingredient, upon a motive of general public policy; and it is designed, in some degree, as a protection to the parties against the effects of overweening confidence and self-delusion, and the infirmities of hasty and precipitate judgment. These Courts will, therefore, often interfere in such cases, where, but for such a peculiar relation, they would either abstain wholly from granting relief, or would grant it in a very modified and abstemious manner.\*

**Application of the Rule.**—It must be observed that the rule laid down by this section applies only in transactions between the parties ;

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\* *Vide* Story's Equity Jurisprudence, Grigby's Ed., sec. 807.



thus, where A, on attaining majority, sued to set aside a compromise effected by his guardian in a suit against the guardian on account of debts of A's father, on the ground that the compromise was collusive, it was held that the burden of proof lay on A to show collusion and fraud, and that, in absence of proof, the suit must be dismissed—*Lekraj Roy v. Mahtab Chund*, 7 Mad. Jurist, 186.

In addition to the instances of the application of the rule supplied by the illustrations, the following may also be mentioned :—"Where a guardian or other person standing in the place of a parent purchases or takes a gift of property from his ward before or immediately after the latter has come of age : where a minister of religion, medical attendant, or other person has, through the means of a position presenting peculiar opportunities, acquired special confidence. Agents, trustees, executors, administrators, auctioneers, and others have been held to fall within the rule. The section requires that the party on whom the burden of proof is laid should have been in a position of active confidence."—Field's Ev., 5th Ed., 510.

Mr. Story, in his Equity Jurisprudence, mentions several instances where the Courts of Equity will apply the general principle that wherever confidence is reposed, and one party has it in his power, in a secret manner for his own advantage, to sacrifice those interests which he is bound to protect, he will not be permitted to hold any such advantage : 1st—All contracts and conveyances whereby benefits are secured by children to their parents ; 2nd—Transactions between client and attorney or solicitor, because the situation of an attorney or solicitor puts it in his power to avail himself, not only of the necessities of his client, but of his good nature, liberality, and credulity, to obtain undue advantages, bargains, and gratuities ; 3rd—Gifts procured by agents, and purchases made by them from their principals. Such transactions are scrutinized with a close and vigilant suspicion, because the habitual confidence reposed in the agent makes all his acts and statements possess a commanding influence over the principal ; 4th—Transactions between guardian and ward. The relative situation of the parties imposes a general inability to deal with each other ; 5th—Transactions between parties who stand in the relationship of trustee and *cestui que* trust, or rather beneficiary, or fide-commissary. A trustee is not permitted to obtain any profit or advantage to himself in managing the concerns of the *cestui que* trust, because the general rule is that he is bound not to do anything which can place him in a position inconsistent with the interests of the trust, or which has a tendency to interfere with his duty in discharging it. This doctrine also applies to other persons standing in like situation, such as assignees and solicitors of a bankrupt or

insolvent estate, executors and administrators, &c. There are many other cases of persons, standing in regard to each other, in the like confidential relations, in which similar principles apply. Among these may be enumerated the cases which arise from the relation of landlord and tenant, of partner and partner, of principal and surety, and various others, where mutual agencies, rights, and duties are created between the parties by their own voluntary acts or by operation of law.

**Mala-fides.**—See secs. 14—17 of the Indian Contract Act, where persons are exercising legal powers, such as those of compulsory purchase, or of dealing with the surface under a mining lease, the burden of proving bad faith rests on the impugners of the exercise thereof—*James v. Lovel*, 56 L. T. 735.

**Agent.**—(a). An instrument executed by a widow, after setting apart the rental of villages belonging to her as her patrimony, to defray the expenses of her and her deceased husband's tombs, gave to her managing agent, who was her sole adviser, the management of the endowment in perpetuity with the residue, after the above expenditure should have been met, for himself, so that a large surplus would have remained each year in his hands, and he would have been the person substantially interested. *Held*, that this transaction was within the well-recognised principle that every *onus* was thrown upon a person who fills such a character as he did, of showing conclusively that the transaction was an honest and a *bona fide* one, as to which a woman in the position of this lady had some independent advice, or some opportunity of knowing exactly what she was about, and in which she was not under the complete influence of her manager—*Wasid Khan v. Ewas Ali Khan*, I. L. R. 18 Cal. (P. C.) 535.

(b). Where a muktear, in consequence of proceedings taken by him as the agent of his client, got possession of property on her behalf and sought to retain possession adversely to her on the ground of an alleged contract entered into with her when he undertook to be her legal adviser or manager, the case was held to fall under the operation of the rule of equity that a contract of sale or conveyance entered into by anyone with another who stands to him in a relation of confidence or trust (especially if the contract is between attorney or skilled legal adviser and client in respect to property, the subject of advice) is liable to be called in question by the vendor, and to be set aside at his instance if it be found that the other party made an unfair use of his advantages. In such cases undue influence is presumed until the contrary is proved, and it is incumbent on the purchaser to prove that all the terms of the contract are fair, adequate, and reasonable—*R. A. Poushong v. Mussumut Moonia Halwain*, 10 W. R. 128.

(c). Where a muktear sued his client, a Hindoo widow, upon a perwannah bearing the client's seal and purporting to give away valuable properties without any substantial consideration ; *held*, that the *onus* was on the plaintiff to satisfy the Court fully as to the circumstances under which the client's seal was obtained, and to prove that the gift was made advisedly—*Rampersaud Misser v. Ranes Phoolputtee*, 7 W. R. 99.

**Guardian and Ward.**—This relationship gives the guardian an advantage over his ward in three ways : *1st*—In the confidence which a young and unsuspecting person places in apparent integrity ; *2nd*—In superior, general, and special knowledge ; *3rd*—In the influence which may be derived from improper indulgence.

In *Hatch v. Hatch*, 9 Vesey, 292, Lord Chancellor Eldon said : “The case proved the wisdom of the Court in saying it is almost impossible in the course of the connection of guardian and ward, attorney and client, and trustee and *cestui que* trust, that a transaction shall stand purporting to be bounty for the execution of antecedent duty. There may not be a more moral act, one that would do more credit to a young man beginning the world, or afford a better omen for the future, than if a trustee having done his duty, the *cestui que* trust, taking it into his fair, serious, and well-informed consideration, were to do an act of bounty like this. But the Court cannot permit it, except quite satisfied that the act is of that nature for the reason often given, and recollecting that in discussing whether it is an act of rational consideration, an act of pure volition uninfluenced, that inquiry is so easily baffled in a Court of Justice, that instead of the spontaneous act of a friend uninfluenced, it may be the impulse of a mind misled by undue kindness or forced by oppression.”

**Purdanashin woman.**—(a). In order to charge a purdanashin woman upon an instrument or power purporting to have been executed by her, it is requisite that the person relying on such a document should give satisfactory evidence that it has been explained to and understood by her—*Sudisht Lal v. Mussumut Sheobart Koer*, 1. L. R. 7 Cal. (P. C.) 245.

(b). Where a *purdanashin* lady makes an appropriation of property, which so far as words go is a *Wuqf*, it still remains to consider whether it was intended by the appropriator to operate as such. Such ladies have a claim to special consideration, particularly where they deny on oath an effectual knowledge of documents which they are said to have made—*Delrus Banoo Begum v. Nawab Syud Asgur Ali Khan*, 23 W. R. 453.

(c). A Court, when dealing with the disposition of her property by a *purdanashin* woman, ought to be satisfied that the transaction was

explained to her, and that she knew what she was doing, especially in a case where, without legal assistance, for no consideration, and without an equivalent, she has executed a document, written in a language she does not understand, which deprives her of all her property. In the case of a *pardanashin* woman, who has no legal assistance, the ordinary presumption, that if a person of competent capacity signs a deed, he understands the instrument to which he has affixed his name, does not arise—*Ashgar Ali v. Delros Banoo Begum*, I. L. R. 3 Cal. (P. C.) 324. *Vide* also (1) *Tacoordeen Tewarry v. Nawab Syed Ali Hossein Khan*, 21 W. R. (P. C.) 340 ; (2) *Pannalal Sil v. Bama Sundari Dassai*, 6 B. L. R. 732 ; (3) *Gfose v. Amirtamayi Dassai*, 4 B. L. R. O. J. 1.

(d). In a suit by a *pardanashin* Mahomedan lady S., to recover Government securities indorsed over to her husband B. R., by her ; *held*, that the burden of proving the reality and *bona fides* of the purchases pleaded by him lay upon B. R., and that the burden had not been discharged—*Moonshee Buzloor Ruheem v. Shumsoonnissa Begum*, 8 W. R. (P. C.) 3.

**Parents and Children.**—Gifts from children to parents are looked upon with suspicion. In *Baker v. Bradley*, 7 D. M. and G. 597, Lord Justice Turner laid down that when a settlement made by a child, on coming of age, of his property, which is tainted with the slightest advantage to the parent, who induces the child to enter into the transaction, the whole thing is bad, unless it can be proved not merely that the child knew what the transaction was, but that she was in no respect influenced by the peculiar relation in which they stood to each other.

**Spiritual Adviser and Religious Director.**—(a). Vice-Chancellor Stuart, in delivering judgment in the case of *Nottidge v. Prince*, 60 J, 1067, said : “Where a gift is made under the influence of delusion or deception, it cannot be valid whether the delusion relates to matter spiritual or matters temporal is immaterial. The strength of religious influence is far beyond that of gratitude to a guardian, trustee, or attorney, and the same ground of public utility which requires this Court to guard against such influences has its most important application to that influence which is the strongest. In Roman Catholic countries, where spiritual influence has its highest dominion, public feeling has required the interposition of an absolute and imperative check. The law of France, as stated by M. Pothur, absolutely prohibits not only all gifts by a penitent to his confessor, but all gifts to that religious community of which the confessor is a member.”

(b). In a suit under sec. 39 of the Specific Relief Act (I of 1877) for cancelment of a deed of gift executed by the plaintiff in favour of the defendant, the plaintiff was a Chatri by caste, well advanced in years, and the defendant was his guru or spiritual adviser, a Brahmin held in high consideration in the locality where he resided. The gift comprised the whole of the plaintiff's property, and the only reason for its execution was the plaintiff's desire to secure benefits to his soul in the next world, and his having heard the defendant recite the holy book called Bhagwat. Almost immediately after execution of the deed, the plaintiff repudiated it, and sued for its cancellation on the ground of fraud. *Held*, that having regard to the fiduciary relation subsisting between the parties, the improvidence of the gift, the absurdity of the reason alleged for it, and the principle recognised by sec. 111 of the Evidence Act, the burden rested upon the defendant to show that the transaction was made without undue influence and in good faith; and in the absence of such proof, the plaintiff was entitled to obtain cancellation of the deed—*Mannu Singh v. Umadat Pande*, I. L. R. 12 All. 523. (*Sital Prasad v. Parbhu Lal*, I. L. R. 10 All. 535, referred to).

**Trustee.**—If a trustee purchases from a *cestui que* trust, he takes upon himself the *onus* of proving the fairness of the transaction, and he cannot shift the *onus* merely by proving that there was an agreement, because in all such cases there are agreements. *Vide, In re Biel's Estate: Gray v. Warner*, L. R. 16 Eq. 577

112. The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

**Purport of the Section.**—This section reproduces the English law, so far as regards the rule observed in English Courts, that where access is proved, the presumption of legitimacy cannot be rebutted by proof of adultery. The law will not allow a balance of evidence

as to who was most likely the father of the child.\* According to English law, it is a presumption *juris et de jure* that a child born after wedlock, of which the mother was even visibly pregnant at the time of marriage, is the offspring of the husband. So every child born during wedlock, where the married parties are neither *infra núbiles annos*, nor physically disqualified for sexual intercourse, is presumed legitimate, even when they are living apart by mutual consent; but not when they are separated by a sentence pronounced by a Court of competent jurisdiction, in which case obedience to the sentence of the Court will be presumed. This presumption of legitimacy is a very strong one, and is met only by proof of non-access.

**Access.**—Access means access in the sexual sense of the term, consequently the illegitimacy of a child may be proved by showing either that the husband was impotent, or that the husband and wife had never met under such circumstances as would admit of sexual intercourse; but where access is proved, the presumption of legitimacy cannot be rebutted by proof of adultery.

A wife can be examined as to non-access of her husband during her married life, without independent evidence being first offered to prove the illegitimacy of her children—*Rosario v. Inglis*, I. L. R. 18 Bom. 468.

**Hindu Law.**—*Vide* Macnaghten's Hindu Law, Chap. VIII, sec. 31; *Ramamani Ammal v. Kalanthi Natchiar*, 14 Moo. I. A. 346.

**Mahomedan Law.**—(a). In the case of *Ashruf-ood-dowlah Ahmed Hossein Khan v. Hyder Hossein Khan*, 11 Moo. I. A. 94, their Lordships of the Privy Council said: "The presumption of legitimacy from marriage follows the bed, and whilst the marriage lasts, the child of the woman is taken to be the husband's child; but this presumption follows the bed, and is not antedated by relation. An antenuptial child is illegitimate. A child born out of wedlock is illegitimate; if acknowledged, he acquires the status of legitimacy. *Vide* also (1) *Mahomed Bonker Hossein Khan v. Shurfoon Nissa Begum*, 8 Moo. I. A. 159; (2) *Bibi Najeebunnissa v. Bibi Zumirrun*, 11 W. R. 426; (3) *Jeswant Singjee Ubby Singjee v. Jet Singjee Ubby Singjee*, 3 Moo. I. A. 245; (4) Hedaya, Chap. XIII; (5) *Khajah Hidayutollah v. Rai Jan Khanum*, 3 M. I. A. 295.

(b). In *Khajurunnissa v. Roshan Johan*, I. L. R. 2 Cal. 199, the legitimacy was presumed of a son, who, though not recognised by his father on any particular occasion, was always treated on the same footing as the other legitimate sons.

\* *The Banbury Peerage case*, 1 Sim. and sec. 163; *Head v. Head*, 1 Sim. and sec. 152; *Morris v. Davis*, 5 Cl. and F. 163.

113. A notification in the *Gazette of India* that any portion of British territory has been ceded to any Native State, Prince or Ruler, shall be conclusive proof that a valid cession of such territory took place at the date mentioned in such notification.

*Proof of cession of territory.* In the case of *Damodar Gordhan v. Deoram Kanji*, I. L. R. 1 Bom. (P. C.) 367, their Lordships of the Privy Council said: "The Governor-General in Council being precluded by the Act 24 and 25 Vic. Cap. 67, sec. 22, from legislating directly as to the sovereignty or dominion of the Crown over any part of its territories in India or as to the allegiance of British subjects could not, by any legislative act purporting to make a notification in a Government Gazette conclusive evidence of a cession of territory, exclude inquiry as to the nature and lawfulness of that cession." *Vide* also *Luchmi Narain v. Raja Partap Singh*, I. L. R. 2 All. 1.

114. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

*Court may presume existence of certain facts.*

### *Illustrations.*

The Court may presume—

(a). That a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession.

(b). That an accomplice is unworthy of credit, unless he is corroborated in material particulars.

(c). That a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration.

(d). That a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist, is still in existence.

(e). That judicial and official acts have been regularly performed.

(f). That the common course of business has been followed in particular cases.

(g). That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.

(h). That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him.

(i). That when a document creating an obligation is in the hands of the obligor, the obligation has been discharged.

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it—

As to illustration (a)—A shop-keeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business.

As to illustration (b)—A, a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally good character, who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself.

As to illustration (b)—A crime is committed by several persons. A, B and C, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable.

As to illustration (c)—A, the drawer of a bill of exchange, was a man of business. B, the acceptor, was a young and ignorant person, completely under A's influence.

As to illustration (d)—It is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course.



As to illustration (e)—A judicial act, the regularity of which is in question, was performed under exceptional circumstances.

As to illustration (f)—The question is whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances.

As to illustration (g)—A man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family.

As to illustration (h)—A man refuses to answer a question which he is not compelled by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked.

As to illustration (i)—A bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it.

**Scope and purport of the Section.**—The rules inunciated in this section are founded on propositions concerning human nature which are only approximately true. They depend upon previous inductions of which the truth is generally recognised, and serve as guides in drawing inferences in particular cases under certain circumstances. The technicalities, which in English law beset the subject, have been done away with by this section, and a simple rule of reasonable inference has been laid down. The Act requires that in order to arrive at the probabilities in each case, the "habits of the country, disposition and manners of the inhabitants, customs of trade, local usages, the general spirit, and tendency of the existing law," will have to be taken into account, and the Court must, in each instance, draw a reasonable inference from all the facts of the case. It, however, leaves the Court free to make the presumption or not according to its own discretion. Sir J. F. Stephen, in introducing the Bill, said : "The fact of this provision is to make it perfectly clear that Courts of Justice are to use their own common sense and experience in judging of the effect of particular facts, and that they are to be subject to no technical rules whatever on the subject. The illustrations given are, for the most part, cases of what in English law are called presumptions of law ; artificial rules as to the effect of evidence by which the Court is bound to guide its decision, subject, however, to certain limitations which it is difficult either to understand or to apply, but which will be swept away by the section in question (114)." Many topics, which

have nothing to do with the law of evidence, have been treated under the head of presumptions by English text-writers. The Indian Evidence Act deals with those only which are of real practical importance. They fall under the following heads : "1st—There are a few cases in which it is expedient to provide that one fact shall be conclusive proof of another, for various obvious reasons ; the inference of legitimacy from marriage is a good instance ; 2ndly—There are several cases in which Courts would be at a loss as to the course which they ought to take under certain circumstances without a distinct rule of guidance. . . . All cases of this kind fall properly under the head of the Burden of Proof, and I think it will be found that the provisions contained in Chapter VII of the Bill provide for all of them." Presumptions are almost infinite in number and are arranged in a variety of ways. The Act in secs. 79—90 provides for certain presumptions in special cases. Some presumptions have the effect of laying the burden of proof on particular persons in particular cases. These have been dealt with in secs. 103 to 111. Secs. 112 and 113 deal with conclusive presumptions. The presumptions mentioned in sec. 114 are, in substance, mere maxims by which the Court ought to be guided in the interpretations of facts. Such presumptions fall under three classes : 1st—Presumptions arising from the common course of natural events ; 2nd—Presumptions from the common course of human conduct ; 3rd—Presumptions arising from the common course of public and private business. Illustration (d) refers to the 1st class. Illustrations (a), (b), (g), (h) and (i) refer to the 2nd class. Illustrations (c), (e) and (f) refer to the third class. In the illustrations a number of the most familiar presumptions of the English law are given, and it is shown in the first half of the illustrations how the Court might be justified in following them, and in the second, how other circumstances might justify the Court in setting them aside.

**Classification of presumptions according to the Act.**—A classification of the presumptions mentioned in the Act is given below, for the better understanding of the subject.

**I. Conclusive proof.** *Vide* sec. 4. The Act creates two such presumptions, namely, as to legitimacy (sec. 112) and as to cession of territory (sec. 113).

**II. Cases where the Court shall presume.** A Court shall presume the following :—

- (a). That a properly certified copy is genuine, sec. 79.
- (b). That proper records of confessions and depositions are genuine, sec. 80.

- (c). That Gazettes are genuine, sec. 81.
- (d). That documents admissible in England or Ireland, without proof of seal or signature, are genuine, and are admissible in this country, sec. 82.
- (e). That maps and plans made under Government authority are accurate, sec. 83.
- (f). That books and reports published under Government authority of any country are genuine, sec. 84.
- (g). That authenticated powers of attorney, purporting to have been properly executed and authenticated, were so executed and authenticated, sec. 85.
- (h). That every document called for, and not produced after notice, was stamped, attested, and executed according to law, sec. 89.

III. Cases where it may presume. A Court may presume the following :—

- (a). That certified copies of foreign judicial records are genuine and accurate, sec. 86.
- (b). That books and maps of public and general interest were written and published by the person, and at the time mentioned thereon, sec. 87.
- (c). That a telegraphic message received, corresponds with a message delivered for transmission. (But it shall not presume anything regarding the deliverer for transmission), sec. 88.
- (d). That a document purporting or proved to be thirty years old, produced from proper custody, bears the signature, and is in the handwriting of the person who purports to have written it, and if attested, &c., that it was properly so attested, sec. 90.
- (e). Instances mentioned in this sec. (114).

As the subject of presumptions is of great importance to the student of the Law of Evidence, its general principles are briefly adverted to below.

**Definition of Presumptions.**—Presumptions in general are said to be (A) Presumptions of fact and (B) Presumptions of law. When it is sought to establish a fact in issue by actual, percipient witnesses, a single mental process is necessary to certitude, to wit, belief in the witnesses—in their accuracy, veracity, powers and opportunities of observation. This is direct evidence. When the attempt is made

to establish such fact, not by proof of itself directly, but by proof of other facts, which render its existence in any decree probable, a second mental process is essential to the certitude requisite for affirmative action. There must necessarily be the same belief in the accuracy and veracity of the witness. It is necessary that a second step be taken. In the ordinary course of events, the fact proved and the fact to be established must so commonly and usually co-exist that the existence of the one renders probable to the mind of the tribunal the existence of the other. This second step—the logical inference of the existence of the unknown from proof of the known—is a presumption. Strictly speaking, therefore, all presumptions are of fact. The entire probative force of circumstantial evidence consists in this: it suggests an inference, or, as the phrase is, ‘raises a presumption’ as to the existence of a fact in issue. The term presumption, in its largest and comprehensive signification, may be defined to be an inference affirmative or disaffirmative of the truth or falsehood of a doubtful fact or proposition, drawn by a process of probable reasoning from some thing proved or taken for granted. In its restricted legal signification it is used to designate an inference, affirmative or disaffirmative of the existence of some fact, drawn by a judicial tribunal, by a process of probable reasoning from some matter of fact, either judicially noticed or admitted, or established by legal evidence to the satisfaction of the tribunal. When inferring the existence of a fact from others, Courts of Justice (assuming the inference properly drawn) do nothing more than apply, under the sanction of law, a process of reasoning which the mind of any intelligent being would, under similar circumstances, have applied for itself; and the force of which rests altogether on experience and observation of the course of nature, the constitution of the human mind, the springs of human action, and the usages and habits of society.

**Presumptions of Law.**—Presumptions, or, as they are also called, ‘intendments’ of law, and by the civilians *presumptiones seu positiones juris*, are inferences or positions established by law, common or statute, and are indispensable to every well-regulated system of jurisprudence. They consist of those rules, which, in certain cases, either forbid or dispense with any ulterior inquiry, and are founded, either upon the first principles of justice, or the laws of nature, or the experienced course of human conduct and affairs, and the connection usually found to exist between certain things. . . . The one fact being proved or ascertained, the other, its uniform concomitant, is universally and safely presumed. It is this uniformly experienced connection which leads to its recognition by the law, without other proof; the presumption, however, having more or less force in proportion

to the universality of the experience. They differ from presumptions of fact and mixed presumptions in two most important respects : 1st—That in the latter a discretion, more or less extensive, as to drawing the inference is vested in the tribunal, while in those now under consideration, the law peremptorily requires a certain inference to be made whenever the facts appear, which it assumes as the basis of that inference ; 2nd—As presumptions of law are, in reality, rules of law, and part of the law itself, the Court may draw the inference whenever the requisite facts are before it ; while other presumptions, however obvious, being inferences of fact, could not, at common law, be made without the intervention of jury. A very important distinction exists among presumptions of law,—namely, that some are absolute and conclusive, called by the common lawyers irrebuttable presumptions, and by the civilians *presumptiones juris et de jure* ; while others are conditional, inconclusive, or rebuttable, and are called by the civilians *presumptiones juris tantum*, or simply *presumptiones juris*. Irrebuttable presumptions are inferences which the law makes so peremptorily that it will not allow them to be overturned by any contrary proof, however strong. They are rules determining the quantity of evidence requisite for the support of any particular averment which is not permitted to be overcome by any proof that the fact is otherwise. *Rebuttable* presumptions are those which may always be overcome by opposing proof, presumptive as well as direct. These, as well as the former, are the result of the general experience of a connection between facts or things, the one being usually found to be the companion, or the effect of the other. The connection, however, in this class is not so intimate, or so uniform, as to be conclusively presumed to exist in every case, yet it is so general, that the law itself, without the aid of a jury, infers the one fact from the proved existence of the other, in the absence of all opposing evidence. In this mode the law defines the nature and amount of the evidence which is sufficient to establish a *prima facie* case, and to throw the burden of proof on the other party ; and if no opposing evidence is offered, the jury are bound to find in favour of the presumption. The rules in this class of presumptions, as in the former, have been adopted, by common consent, from motives of public policy, and for the promotion of the general good ; yet not, as in the former class, forbidding all further evidence, but only dispensing with it till some proof is given on the other side to rebut the presumption raised.

**Presumptions of facts.**—Presumptions of fact may be said to relate to things, persons, and the acts and thoughts of intelligent agents. With respect to the first of these, it is an established principle that conformity with the ordinary course of nature ought always to be

presumed. Thus, the order and changes of the seasons, the rising, setting, and the course of the heavenly bodies, and the known properties of matter, give rise to very important presumptions relative to physical facts or things. The same rule extends to persons. Thus, the absence of those natural qualities, powers, and faculties which are incident to the human race in general, will never be presumed in any individual, such, as the impossibility of living long without food, the power of procreation within the usual ages, the possession of the reasoning faculties, the common and ordinary understanding of man, &c. Under the third class—namely, the acts and thoughts of intelligent agents—come, among others, all psychological facts; and here most important inferences are drawn from the ordinary conduct of mankind, and the natural feelings or impulses of human nature, as also from the customs and habits of society.

**Mixed Presumptions.**—These hold an intermediate place between the two former, and consist chiefly of certain presumptive inferences, which, from their strength, importance, or frequent occurrence, attract, as it were, the observation of the law; and from being constantly recommended by Judges and acted on by juries, become, in time, as familiar to the Courts as presumptions of law, and occupy nearly as important a place in the administration of justice. They are, in truth, a sort of *quasi presumptiones juris*, and may be divided into three classes: 1st—Where the inference is one which common sense would have made for itself; 2nd—Where an artificial weight is attached to the evidentiary facts, beyond their mere natural tendency to produce belief; 3rd—Where, from motives of legal policy, juries are recommended to draw inferences which are purely artificial.

**Conflicting Presumptions.**—“It not unfrequently happens that the same facts may, when considered in different points of view, form the bases of opposite inferences; and in either of these cases, it becomes necessary to determine the relative weight due to the conflicting presumptions.” The following rules, if properly understood, will be of great service in determining the relative weight of conflicting presumptions:—

I. Special presumptions take precedence of general. This rule rests on the principle that as all general inferences (except, of course, such as are *juris et de jure*) are rebuttable by direct proof, will naturally be affected by that which comes nearest to it, namely, specific proximate facts or circumstances, which give rise to special inferences, negating the applicability and the general presumption to the particular case. But it is not every circumstance or special inference that will suffice to set aside a general presumption, either of law or fact.

II. Presumptions derived from the course of nature are stronger than casual presumptions. This rule is derived from the constancy and uniformity observable in the works of Nature, which render it probable that human testimonies, or particular circumstances which point to a conclusion at variance with her laws, are, in the particular instance, fallacious.

III. Presumptions are favoured which give validity to act.

IV. The presumption of innocence is favoured in law. This is a well-known rule and runs through the whole criminal law; but it likewise holds in civil proceedings.

**Illustration (a).**—The possession by the accused of the whole or some portion of the stolen property will, in many cases, raise a presumption of guilt sufficient to cast on the accused the *onus* of showing that he came honestly by the stolen property; and in default of his so doing, it will warrant the Court in convicting him as the thief. But as this presumption is subject to the infirmative hypotheses attending real evidence in general, some practical limits have been imposed to its operation, where it constitutes the only evidence against the accused. First, in order to put the accused on his defence, his possession of the stolen property must be recent, although what shall be deemed recent possession must be determined by the nature of the article stolen, *i.e.*, whether they are of a nature likely to pass rapidly from hand to hand or of which the accused would be likely, from his situation in life, or vocation, to become possessed innocently. Secondly, in order to raise this presumption legitimately, the possession of the stolen property should be exclusive, as well as recent. If, for instance, the articles stolen were found on the person of the accused, or in a locked-up house or room, or in a box of which he kept the key, there would be fair ground for calling on him for his defence; but if they were found lying in a house or room in which he lived jointly with others equally capable with himself of having committed the theft, or in an open box to which others had access, this would raise no definite presumption of his guilt. An exception has been said to exist, where the accused is the occupier of the house in which stolen property is found, because, it is argued, he must be presumed to have such control over the house as to prevent anything coming in or being taken out without his sanction. As a foundation for *circumstantial* responsibility, this reasoning may be correct, but to conclude that the master of a house is guilty of *felony*, on the double presumption, first, that stolen goods found in the house were placed there by him or with his connivance, and secondly, even supposing they were, that he was the thief who stole them, there being no corroborating circumstances, is certainly treading on the very verge of artificial conviction.

In dealing with this subject it is to be remarked that the probability of guilt is increased by the coincidence in number of the articles stolen with those found in the possession of the accused,—the possession of one out of a large number stolen being more easily attributable to accident or forgery than the possession of all. It is in its character of a *circumstance* joined with others of a criminative nature that the fact of possession becomes really valuable and entitled to consideration, whether it be ancient or recent, joint or exclusive.

The following remarks, made by Mr. East, are well deserving of attention :—"It has been stated before that the person in whose possession stolen goods are found must account how he came by them, otherwise he may be presumed to be the thief ; and it is a common mode of defence, to state a delivery by a person unknown, and of whom no evidence is given ; little or no reliance can consequently be had upon it. Yet cases of that sort have been known to happen, where persons really innocent have suffered under such a presumption ; and, therefore, where this excuse is urged, it is a matter of no little weight to consider how far the conduct of the prisoner has tallied with his defence, from the time when the goods might be presumed to have first come into his possession."—2 East (P. C.) 665.

"The possession of stolen property *recently* after the commission of a theft is *prima facie* evidence that the possessor was either the thief, or the receiver, according to the other circumstances of the case, and this presumption, when unexplained, either by direct evidence or otherwise, is usually regarded by the jury as conclusive. The question as to what amounts to recent possession varies, according as the stolen article is or is not calculated to pass, readily from hand to hand."—Tayler's Ev., 6th Ed., 151.

The second part of the illustration, as to Illustration (a), gives an instance of circumstances under which recent possession raises a presumption of guilt.

**Accomplice and Spy.**—Those persons do not partake of the criminal contamination of accomplices who enter into communication with the conspirators with an original purpose of discovering their secret designs, and disclosing them for the benefit of the public.\* In *Reg. v. Mullins*,† Mr. Justice Maule defined two sorts of witnesses. Of one sort he said : "They were persons who understanding, as they say, that there were dangerous designs entertained by certain chartist societies, joined the meetings and pretended to sympathise

\* *Vide R. v. Despard*, 28 State Trials 489.

† 3 Cox C. C. 526.



with the views of the conspirators in order that they might communicate their designs to Government. They joined the scheme for the purpose of defeating it, and may be called spies." The others, he says, "were really chartist, concurring full in the criminal designs of the rest for a certain time, until getting alarmed, or from some other cause they turned upon their former associates and gave information against them. These persons may truly be called accomplices." An accomplice confesses himself a criminal and may have a motive for giving information, as it may purchase immunity for his offence. A spy, on the other hand, may be an honest man; he may think that the course he pursues is absolutely essential for the protection of his own interests and those of society; and if he does so, if he believes that there is no other method of counteracting the dangerous designs of wicked men, he may take upon himself the character of an informer. Spies are not such persons as it is the practice to say require corroboration.

A spy is a person, who, knowing of criminal doings or doings which will culminate in a crime, merely pretends to concur with the perpetrators—*Queen-Empress v. Javecharam*, I. L. R. 19 Bom. 363. *Vide also Queen-Empress v. Mona Puna*, I. L. R. 16 Bom. 661.

**Instances.**—1. Where the prisoner was indicted for stealing an axe, a saw, and a mattock, and the whole evidence was that they were found in his possession three months after they were missed, Parke B. directed an acquittal—*R. v. Adams*, 3 C. and P. 600.

2. Where a shovel, which had been stolen, was found about six or seven months after the theft in the house of the prisoner, who was not then at home, Garney B. held that, on this evidence alone the prisoner ought not to be called on for his defence—*R. v. Cruttenden*, 6 Jur. 267.

3. In *R. v. Cooper*, 3 Car. and K. 318, where a mare, which had been lost on the 17th of December, was found in the possession of the prisoner between the 20th of June and the 22nd July following, and there was no other evidence against him, Maule J. held the possession not sufficiently recent to put him on his defence.

4. In *R. v. Crowhurst*, 1 Car. and K. 370, Alderson B. thus directed the jury: "In cases of this nature you should take it as a general principle that, where a man, in whose possession stolen property is found, gives a reasonable account of how he came by it, as by telling the name of the person from whom he received it, and who is known to be a real person, it is incumbent on the prosecutor to show that that account is false; but if the account given by the prisoner be unreasonable or improbable on the face of it, the *onus* of proving

its truth lies on him. Suppose, for instance, a person were to charge me with stealing his watch, and I were to say I bought it from a particular tradesman, whom I name, that is *prima facie* a reasonable account, and I ought not to be convicted of felony unless it is shown that that account is a false one." *Vide also R. v. Smith*, 2 Car. and K. 207; *R. v. Harmer*, 2 Cox Cr. Cas. 487.

5. In *R. v. Partridge*, 3 O. and P. 551, Patteson J. pointed out that the question of what is or is not such a recent possession of stolen property as to require the person in whose possession it is to give an account of how such possession was acquired was to be considered with reference to the nature of the articles stolen, adding "if they are such as to pass from hand to hand readily, two months would be a long time."

6. A common brass drinking cup was stolen in October 1883, and was discovered in the possession of the accused in September 1884. *Held*, in a case in which the accused was tried for receiving stolen property, that his possession of the stolen property, coupled with the fact that he had failed to give an account as to how he became possessed of the property, would, under ordinary circumstances, raise a probable presumption of his guilt; but where, as in this case, such possession was not a recent possession, but one eleven months subsequent to the act of theft, the presumption against him was so slight, that, taken by itself, he ought not to be called upon to explain how his possession was acquired. The question of what is or is not a recent possession of stolen property is to be considered with reference to the nature of the article stolen—*Masheikh v. Queen-Empress*, I. L. R. 11 Cal. 160.

7. In cases in which murder and robbery have been shown to form parts of one transaction, it has been held that recent and unexplained possession of the stolen property, while it would be presumptive evidence against a prisoner on a charge of robbery, would similarly be evidence against him on a charge of murder—*Queen-Empress v. Sami*, I. L. R. 13 Mad. 426.

8. Where stolen property is found with a person who admits having received it, it may be fairly presumed that the receipt was a dishonest one, unless the receiver's conduct is satisfactorily explained—*Ramjoy Kurmohar*, 25 W. R. Cr. 10. In this case the defence of the accused was that the stolen property was pawned with him by one Prosunno Kumar, and in this point he has been supported by the statement of the latter. It also appeared in evidence that when Prosunno Kumar proposed to raise money by pledging it, Ramjoy (the accused) enquired where he got it, to which Prosunno Kumar replied that a respectable person had given it to him to pledge, but

that he did not know the name of the respectable person. The Judge, in reference to this circumstance, said: "I need hardly observe that the above alone would have roused the suspicion of an honest man, and he would have then and there handed over Prosunno to the authorities." On these facts Macpherson and Glover JJ. upheld the conviction of Ramjoy under section 411, I. P. C., on the ground that "it was impossible to say there was not *some* evidence of guilty knowledge." Mr. Mitter J. refused to uphold the conviction, as he thought that the reasons given by the Magistrate were mainly based upon certain facts assumed by that officer and not proved in the case, and as the Magistrate did not distinctly come to a conclusion one way or the other upon the question, whether the shawls (stolen property) were pledged with the accused or not. We think that the opinion of the majority is erroneous, as it is opposed to the principle laid down in *R. v. Crouhurst*, and followed in *R. v. Smith* and *R. v. Hurmer*, quoted above; but we do not think that the reasons assigned by Mitter J. are sound, although he arrived at the right conclusion.

9. Possession of property, which has been stolen from the owner, is generally at best only evidence of theft when the date of the theft is so recent as to make it reasonable to presume, in the absence of explanation, that the person in whose possession the property is found must have obtained the possession by stealing—*The Queen v. Poromeur Aheer*, 23 W. R. Cr. 16.

10. Where property sufficiently identified to be the property of one person is found to be in the possession of another person without leave or license or any legal permission of the owner, it is for the party in whose possession the property is found duly to account for its possession, and unless he can do so, a jury might fairly infer in such circumstances that it was with a guilty knowledge that the prisoner took that which he knew to be not his own—*The Queen v. Shuruffooddeen*, 13 W. R. Cr. 26.

11. The mere finding of property, alleged to be stolen property, in the workshop premises of an accused person, where the accused does not ordinarily reside, is not legally sufficient to infer his guilty knowledge—*Meer Yee Ali, Petitioner*, 13 W. R. Cr. 70.

12. As to finding property concealed in a jungle adjacent to the house of an accused person, see *Bishoo Manji, Appellant*, 9 W. R. Cr. 16.

13. When a prisoner is apprehended eight days after a dacoity with part of the plunder in his possession, there is as good ground for charging him with the dacoity as with having received or retained with guilty knowledge—*Queen v. Motee Solaha*, 5 W. R. Cr. 66.

14. In considering whether the possession of stolen goods raises a presumption of dishonest receipt of stolen property, the attention of the jury should be drawn to the necessity of satisfying themselves that the possession is clearly traced to the accused. The fact of stolen property being found concealed in a man's house would be sufficient to raise a presumption that he knew the property to be stolen property, but it would not be sufficient to show that it had been acquired by dacoity—*Empress v. Mahkari*, I. L. R. 6 Bom. 731.

15. A person who receives the proceeds of a number of different robberies from a number of different thieves on the same day is not to be presumed to be a habitual receiver of stolen goods within the meaning of section 413, I. P. C.—*Queen-Empress v. Baburam Kansari*, I. L. R. 19 Cal. 190.

**Illustration (b).**—In the Full Bench case of *Ellahee Buksh*, 5 W. R. Cr. 80, it was laid down, after a careful review of English and Indian cases on the point, that: *1st*—A conviction may be legally had on the uncorroborated evidence of one or more accomplices; *2nd*—The danger of acting upon the uncorroborated evidence of accomplices was very great as Judges and juries ought not to pay any respect to the testimony of an accomplice, unless he is corroborated not only as to the circumstances of the crime, but also as to the person of the prisoner. The views of the Full Bench have been distinctly adopted in this section and section 133 of the Act. "The rule in section 114 and that in section 133 are part of one subject, and neither section is to be ignored in the exercise of judicial discretion. The Illustration (b) is, however, the rule, and when it is departed from, I think the Court should show, or that it should appear, that the circumstances justify the exceptional treatment of the case."\* Mr. Taylor has said that "some few general propositions are now universally taken for granted in the administration of justice, and are sanctioned by the usage of the Bench. Such, for instance, is the caution given to juries to regard with distrust the testimony of an accomplice, unless it be materially confirmed by other evidence. There is no rigid presumption of the common law against such testimony, yet experience has shown that it is little worthy of credit, and on this experience the usage is founded." Sir R. Couch C. J. and Sir Barnes Peacock C. J. have held that it would certainly be unsafe to depart in India from the established practice of England in the application of the rule requiring corroboration. Mr. Phillips, in his treatise on the Law of Evidence (Vol. I, p. 95), remarks that the practice of requiring corroboration of an accomplice's evidence has obtained so much sanction from legal authority that a deviation from it in any particular case would be justly considered as of questionable propriety."

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\* *Vide Queen-Empress v. Chagan Dayaram*, I. L. R. 14 Bom. 344.

**Nature of corroboration required.**—1. In the nature of things, no one knows so well the actual facts of the case as the approver, who, by his own admission, has taken a part in them. And as he has confessed his own guilt, there is generally no reason why he should misrepresent them, except so far as it may be possible for him thereby to shift a measure of culpability from his own shoulders to those of some one else, *viz.*, of course, to those of the prisoner against whom he is giving testimony. Hence the question always is in any given case, Is the approver speaking the truth, not merely when he details the general facts, but when he says that the prisoner participated in the transaction, and did that which it was necessary that he should have done, in order for him to become criminally liable to the charge made against him. It is generally understood now that the evidence of an accomplice cannot be safely acted upon as against persons accused by him excepting when it is corroborated in regard to the particulars which implicate them. The corroboration which is needed in order to make the approver's testimony against the prisoner trustworthy should be corroboration derived from evidence which is independent of accomplices, which is not vitiated by the accomplice character of the witness—not affected, namely, by the disposition on the part of one whose guilt is disclosed to purchase impunity or advantage by falsely accusing others; and further should be such as to support that portion of the accomplice's testimony which makes out that the prisoner was present at the time when the crime was committed and participated in the acts of commission. *Vide* (1) *The Queen v. Mohes Biswas*, 19 W. R. Cr. 16; (2) *The Queen v. Sadhu Mondul*, 21 W. R. Cr. 69; (3) *The Queen v. Chando Chandalini*, 24 W. R. Cr. 55; (4) *The Queen v. Baijoo Chowdhry*, 25 W. R. Cr. 43; (5) *The Queen v. Ramsodoy Chuckerbutty*, 20 W. R. 19; (6) *Reg. v. Budhu Nanku*, I. L. R. 1 Bom. 475; (7) *Queen-Empress v. Magantol*, I. L. R. 14 Bom. 115; (8) *Queen-Empress v. O'hara*, I. L. R. 17 Cal. 642; (9) *Queen-Empress v. Imdad Khan*, I. L. R. 8 All. 137; (10) *Queen-Empress v. Krishna Bhat*, I. L. R. 10 Bom. 319; (11) *Queen v. Suchee Persaud*, 19 W. R. Cr. 43.

2. Where an informer was, upon his own statement, cognizant of the commission of an offence, and omitted to disclose it for six days, the Court was not prepared to say that he was an accomplice, but held that his testimony was not such as to justify a conviction except where it was corroborated—*Eshan Chundra Chundra v. Queen-Empress*, I. L. R. 21 Cal. 328.

3. Where a witness admits that he was cognizant of the crime as to which he testifies, and took no means to prevent or disclose it, his

evidence must be considered as no better than that of an accomplice—*The Queen v. Chando Chandalini*, 24 W. R. Cr. 55.

4. Bribers are no better than accomplices—*Queen-Empress v. Maganlol*, I. L. R. 14 Bom. 115.

5. Improper reception of approver's testimony, which is not corroborated, constitutes a decision erroneous in point of law calculated to prejudice the prisoner, and is a good ground for setting aside a conviction based upon such evidence—*Queen-Empress v. O'hara*, I. L. R. 17 Cal. 642.

6. A Judge should caution a jury not to accept the evidence of an approver unless it is corroborated; the omission to do so amounts to misdirection—*Queen-Empress v. O'hara*, I. L. R. 17 Cal. 642; *Queen-Empress v. Arumuga*, I. L. R. 12 Mad. 196.

7. Exact correspondence in details of several statements made by an approver in the course of a trial is not corroborative evidence, such as is ordinarily required to make it safe to convict a particular prisoner—*Queen-Empress v. Bepin Biswas*, I. L. R. 10 Cal. 970.

8. The evidence requisite for the corroboration of the testimony of an accomplice must proceed from an independent and reliable source, and previous statements made by the accomplice himself, though consistent with the evidence given by him at the trial, are insufficient for such corroboration. The confession of one of the co-prisoners cannot be used to corroborate the evidence of an accomplice against the others—*Reg. v. Malapa bin Kapana*, 11 Bom. H. C. R. 196.

9. Not only as to persons spoken of by an accomplice must there be corroborative evidence, but which is more important still as to the *corpus delicti*, there must be some *prima facie* evidence pointing the same way to make the evidence of the accomplice satisfactory.

**Illustration (c).**—The Negotiable Instruments Act (XXVI of 1881, secs. 118—122) lays down special rules of evidence, by which a presumption is raised to the effect that Bills of Exchange and Promissory Notes are founded on a valuable consideration, until the contrary is proved. The reason is partly because it is important to preserve their negotiability intact, and partly because the existence of a valid consideration may reasonably be inferred from the solemnity of the instruments themselves, and the deliberate mode in which they are executed.\* This presumption may be rebutted if the relation of the parties be such that it would, *prima facie*, suggest weakness on one side, extortion or advantage taken of that weakness on the other. In such cases the transaction cannot stand unless the person claiming

\* *Vide Taylor on Ev.*, sec. 148.

the benefit of it is able to repel the presumption by contrary evidence, proving it to have been, in point of fact, fair, just, and reasonable.\*

According to the English law, a Bill of Exchange, in the absence of proof to the contrary, is presumed to have been accepted within a reasonable time after its date, and before it came to maturity. *Vide Roberts v. Bethell*, 12 C. B. 778.

**Illustration (d).**—It is a very general presumption that things once proved to have existed in a particular state are to be understood as continuing in that state until the contrary is established by evidence either direct or circumstantial. The ordinary legal presumption is that things remain in their original state. (*Jariatullah Batul v. Hossaini Begum*, 11 Moo. I. A. 194). *Vide* notes to sections 100 and 110 *ante*.

**Instances.**—1. In the Full Bench case of *Mahomed Ali Khan v. Khaja Abdul Gunny*, I. L. R. 9 Cal. 744, it was laid down “that where land (such as jungle, waste, sandy char, and diluviated land) has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes at such a time, and under such circumstances that that state naturally would, and probably did, continue till within twelve years before suit, it may properly be presumed that it did so continue, and that the plaintiff’s possession continued also, until the contrary is shown. This presumption seems to be reasonable in itself, and in accordance with the legal principles now embodied in sec. 114 of the Evidence Act.” *Vide* also (1) *Mohiny Mohun Das v. Krishno Kishore Dutt*, I. L. R. 9 Cal. 802; (2) *Kalicharan Sahoo v. The Secretary of State for India*, I. L. R. 6 Cal. 725; (3) *Mano Mohun Ghose v. Mathura Mohun Roy*, I. L. R. 7 Cal. 225; (4) *Radha Govind Rai v. Inglis*, 7 C. L. R. (P. C.) 364; (5) *Mahomed Ibrahim v. Morrison*, I. L. R. 5 Cal. 36; (6) *Ram Bundhu v. Kusu Bhatta*, 5 C. L. R. 481; (7) *Lilanund Singh v. Bassirunnissa*, 16 W. R. 102; (8) *Mochiram v. Bissambhar*, 24 W. R. 410; (9) *Watson & Co. v. Government*, 3 W. R. 73; (10) *Mitrojit Singh v. Radha Prasaud Singh*, 23 W. R. 368; (11) *Mahomed Basir v. Karimbuksh*, 11 W. R. 267. *Vide* also the following cases as to the continuance of seisin of an estate where it has been shown to exist: (1) *Wrotesby v. Adams*, Plowd. 193; (2) *Smith v. Hapleton*, *Ibid.* 431; (3) *Cockman v. Farrer*, T. Jones, 181.

2. As to the continuance of a private partition, see *Abhai Charn Sakar v. Harinath Rai*, I. L. R. 8 Cal. 72.

3. Where the authority of an agent has been proved, its continuance will be presumed—*Smout v. Ilbery*, 10 M. and W. 1.

3. Where adultery has been proved, its continuance will be presumed while the parties live under the same roof—*Turton v. Turton*, 3 Hag. N. R. 350.

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\* *Vide Earl of Aglesford v. Morris*, L. R. 8 Ch. 484.

4. Where the fact of insanity has been shown, its continuance will be presumed—*Banks v. Goodfellow*, L. R. 5 Q. B. 549, 570.

5. The presumption is in favour of the continuance of human life—*Wilson v. Hodges*, 2 East 312.

**Illustration (e).**—As regards the proceedings of a public officer, the maxim of common law is "*omnia presumuntur rite solenniter esse acta*" (all acts are presumed to have been rightly and regularly done), and it has been embodied in this illustration. But it is to be borne in mind that where, under an Act, certain things are required to be done before any liability attaches to any person in respect of any right or obligation, it is for the person who alleges that that liability has been incurred to prove that the things prescribed in the Act have been actually done. No presumption can be made in favour of the things prescribed by the Act having been done.\* Nor does this section direct the Court to presume the existence of facts likely to have happened, such as the regular performance of judicial acts, but leaves the Court free to make the presumption, or not according to its discretion.†

Mr. Broom mentions the following presumptions as illustrating the maxim mentioned above : *1st*—That a man, acting in a public capacity, was properly appointed and is duly authorised so to do ; *2nd*—That the records of a Court of Justice have been correctly made, according to the rule *res judicata pro veritate accipitur* ; *3rd*—That Judges and jurors do nothing causelessly and maliciously ; *4th*—That the decisions of a Court of competent jurisdiction are well founded, and their judgments regular ; *5th*—That facts, without proof of which the verdict could not have been found, were proved at the trial ; *6th*—That the decision of a Court of competent jurisdiction was right.

*Vide* secs. 79—90 *ante*.

1. It cannot be presumed under Ill. (e) that the notice provided by sec. 52 of the Road-cess Act (IX of 1880, B. C.) was duly published—*Ashanullah Khan Bahadur v. Trilochun Bagchi*, I. L. R. 13 Cal. 197. *Vide* also *Rash Behari Mukerji v. Petambari*, I. L. R. 15 Cal. 237.

2. Before the deposition of a medical witness taken by a Committing Magistrate can, under sec. 509 of the Code of Criminal Procedure, be given in evidence at the trial before the Court of Session, it must either appear from the Magistrate's record or be proved by the evidence of witnesses to have been taken and attested by the Magistrate in the presence of the accused. The Court is neither bound to presume under sec. 80, nor ought it to presume

\* *Vide* I. L. R. 13 Cal. 199.

† *Vide* I. L. R. 9 All. 720.



under either sec. 80 or sec. 114, III. (e) of the Evidence Act, that the deposition was so taken and attested—*Kachali Hari v. Queen-Empress*, I. L. R. 18 Cal. 129. *Vide* also (1) *Queen-Empress v. Ridding*, I. L. R. 9 All. 720; (2) *Queen-Empress v. Phop Sing*, I. L. R. 10 All. 174.

**Illustration (f).**—"Thus the receipt of rent, after the expiration of an old lease, raises a legal presumption of a new tenancy from year to year. Servants, where nothing to the contrary appears, will be presumed to have been hired on the terms locally usual; telegrams are presumed to be correctly transmitted, sec. 88; letters are presumed to have been posted according to the post-mark; and a letter duly posted will be presumed to have reached its destination."—*Cun. Ev.*, 310.

*Vide* secs. 16 and 18 *ante*.

A suit instituted by a *benamidar* is presumed to have been instituted with the consent and by the authority of the beneficiary owner. *Vide Gopinath Chowbey v. Bhagwan Persaud*, I. L. R. 10 Cal. 697.

**Illustration (g).**—"If a man, by his own tortious act, withhold the evidence by which the nature of his case would be manifested, every presumption to his disadvantage will be adopted." Where a party has the means in his power of rebutting and explaining the evidence adduced against him, if it does not tend to the truth, the omission to do so furnishes a strong inference against him. But if the evidence alleged to be withheld is shown to be unattainable, the presumption ceases. Presumption in *odium spoliatoris* must not be conjectures, nor grounded on data which the evidence itself shows to be inexact. It is said that the presumption against the spoliator of documents is not confined to assuming those documents to be of a nature hostile to him, and procuring a more favourable reception for the evidence of his opponent; but that it has the further effect of casting suspicion on all the other evidence adduced by the party guilty of the malpractice.

If it be shown that a plaintiff has been suborning false testimony, and has endeavoured to have recourse to perjury, it is strong evidence that he knew perfectly well that his cause was an unrighteous one. "If a man destroys a thing that is designed to be evidence against himself, a small matter will supply it."

**Instances.**—1. The leading English case on this subject is that of *Armory v. Delamirie*, 1 Sm. L. O. 357, where a person in a humble station of life, having found a jewel, took it to the shop of a goldsmith to enquire its value, who, having got the jewel into his possession, under pretence of weighing it, took out the stones, and

on the finder refusing to accept a sum for it returned to him the empty socket. An action of trover having been brought to recover damages for the detention of the stones, the jury were directed that, unless the defendant produced the jewel and thereby showed it not to be of the finest water, they would presume the strongest against him, and make the value of the best jewels that would fit the socket, the measure of their damages.

2. In the case of *Wutzler v. Sharpe*, I. L. R. 15 All. 270, it was said that owing to the non-production by the plaintiffs of their title-deeds, it must be presumed as against them that the evidence afforded thereby would be unfavourable to their claim.

3. In the case of *Ram Prasad v. Raghunandan Prasad*, I. L. R. 7 All. 738, three important documents of the defendants were said to have been burnt; but this fact was not proved, and it was held that the non-production of the documents raised against the defendants the presumption recognised by this illustration. *Vide also Ram Sundari Dasi v. Radhika Chowdhraïn*, 13 Moo. I. A. 269.

4. In a suit to recover the value of plundered property, where a question arose as to the amount of the property misappropriated, it was ruled that unless the defendant produced the property and showed it not to be of the value stated by the plaintiff, the strongest presumption should be made against him, and the highest value assumed—*Soondur Mones Chowdhraïn v. Bhobun Mohun Chowdhary*, 11 W. R. 536.

**Criminal Cases.**—"Whatever weight may be legitimately attached to this presumption in civil cases, great care must be taken in criminal cases, where life and liberty are at stake, not to give to spoliation, or similar acts, any weight to which they are not entitled. Undoubtedly the suppression or fabrication of evidence by a party accused of a crime is always a circumstance, frequently a most powerful one, to prove his guilt. But many instances have occurred of innocent persons—alarmed at a body of evidence against them, which, although false or inconclusive, they felt themselves unable to refute—having recourse to the suppression or destruction of criminative, and even to the fabrication of exculpatory testimony."—Best, 8th Ed., 374.

1. "The prosecutor is bound to produce all the evidence in his favour directly bearing upon the charge. It is, *prima facie*, his duty, accordingly, to call those witnesses who prove their connection with the transaction in question, and also must be able to give important information. The only thing that can relieve him from calling such witnesses is the reasonable belief that, if called, they would not speak the truth. If such witnesses are not called without sufficient

reason being shown (and the mere fact of their being summoned for the defence seems to us by no means necessarily a sufficient reason), the Court may properly draw an inference adverse to the prosecution. There is no corresponding inference against the accused. He is merely on the defensive, and owes no duty to any one but himself. He is at liberty, as to the whole or any part of the case against him, to rely on the witnesses of the case for the prosecution, or to call witnesses, or to meet the charge in any other way he chooses ; and no inference, unfavourable to him, can properly be drawn, because he takes one course or the other." Remarks of Wilson J., *In re Dhunno Kazi*, I. L. R. 8 Cal. 121. *Vide also Hurry Charn Chuckerbutty v. Empress*, I. L. R. 10 Cal. 140.

2. In the case of *Queen-Empress v. Ramsahai Lall*, I. L. R. 10 Cal. 1070, Field J. observed : "In conducting a case for the prosecution, all the persons who are alleged or are known to have knowledge of the facts, ought to be brought before the Court and examined. No doubt, it may happen that certain witnesses will conceal facts which they know, or alter their account of what they have seen. Nevertheless, these witnesses should be before the Court, and the Judge and the assessors, or the jury, if the case is tried by a jury, should have an opportunity of forming their own judgment as to their credibility or otherwise." *Vide also* (1) *Queen-Empress v. Bankhandi*, I. L. R. 15 All. 6 ; (2) *Empress v. Tulla*, I. L. R. 7 All. 904.

3. In a trial before the Sessions Court, the prosecution is not bound to tender for cross-examination all witnesses called before the Committing Magistrate. The Court would not call a witness on whose evidence it could not put implicit reliance—*Empress v. Kali Prossunno Dass*, I. L. R. 14 Cal. 245. *Vide also Queen-Empress v. Stanton*, I. L. R. 14 All. 521.

4. In a trial before a Court of Session or a High Court, the Public Prosecutor conducting the case for the Crown is not bound to call as a witness for the Crown, or to put into the witness-box for the purpose of cross-examination any of the witnesses appearing in the calendar as witnesses for the Crown, whose evidence is, in his opinion, false—*Queen-Empress v. Durga*, I. L. R. 16 All. (F. B.) 84. Their Lordships in this case remarked : "In our opinion, a Public Prosecutor should not refuse to call or put into the witness-box for cross-examination a truthful witness returned in the calendar as a witness for the Crown, merely because the evidence of such witness might, in some respects, be favourable to the defence."

**Illustration (h).—**As to witness's refusal to answer question as to character, *vide* sec. 148 *post*.

As to accused person's refusal to answer, *vide* sec. 342 of the Criminal Procedure Code.

**Illustration (i).—1.** "A bill having got back into the acceptor's hands is presumed to have been paid: it is sufficient evidence of payment for the acceptor to produce the bill"—*Shearman v. Fleming*, 5 B. L. R. 619.

2. In a suit on a bond, where defendant pleaded satisfaction, *held*, that as the bond was in the hands of the obligor, who was not shown to have stolen it, it was rightly presumed that the obligation had been discharged—*Gonesh Chunder Saha v. Khetoo Meah*, 22 W. R. 266.

3. In the case of *Abdul Karim v. Manjihansraj*, I. L. R. 1 Bom. 295, it was held that the admission by the defendant of the drawing of the hundi for value received laid on him the burden of proving payment, and that, though the possession by the defendant of the hundi was a circumstance in his favour, yet, as it did not in itself amount to proof of payment, the *onus probandi* was not thereby shifted to the plaintiff. (*Doyal Gairaj v. Khata Ladha*, 12 Bom. H. C. R. 97; and *Chinnasami Iyengar v. Gopalacharry*, 7 Mad. H. C. R. 392, dissented from).

**Conclusive presumptions not mentioned in the Act.—1.** For the purpose of determining the legal rights and liabilities of parties, the Courts conclusively presume that every sane person, above the age of 14 years, is acquainted with the criminal as well as the civil, the common as well as the statute, law of the land.

2. A sane man of the age of discretion is conclusively presumed to contemplate the natural and probable consequences of his own acts. This presumption is not confined to criminal matters, but extends equally to the party's civil liabilities.

3. An infant, under the age of seven years, is conclusively presumed to be incapable of committing any felony for want of discretion.

4. A female, under the age of ten years, is presumed incapable of consenting to sexual intercourse.

**Rebuttable presumptions not mentioned in the Illustrations:—**

1st.—Every man is presumed to be of sane mind until the contrary is shown.

2nd.—The law presumes that every man obeys the mandates of the law.

3rd.—The law presumes all individuals to be possessed of the power of procreation within the usual ages.

4th.—The law presumes against vice and immorality.

5th.—It is to be presumed that natural love and affection form a good consideration sufficient to support all instruments where a valuable consideration is not expressly required by law, and that money advanced by a parent to his child is intended as a gift, not as a loan.

6th.—It is generally presumed that documents were made on the day they bear date.

7th.—The law presumes that lost instruments were duly stamped.

8th.—Due appointment is presumed from acting in public office.

9th.—Judges and jurors are presumed to do nothing causelessly or maliciously.

10th.—A parson is presumed to be always resident on his benefice.

11th.—A person is presumed to retain his domicile until the intention and fact of acquiring a new one is shown.

12th.—Persons living together as man and wife are, on grounds of morality and decency, presumed to have been legally married.

13th.—All testimony given in a Court of Justice is presumed to be true until the contrary appears.

14th.—The presumption of law is that title is to be presumed from lawful possession until the want of title or a better title be proved. *Vide* (a) *Baroda Kant Rai v. Chunder Cumar Rai*, 12 Moo. I. A. 225; (b) *Wali Ahmed Khan v. Ajudhya Kandu*, I. L. R. 13 All. 537; (c) *Trilochan Ghosh v. Koylash Nath Bhattacharji*, 12 W. R. 175; (d) *Kali Chundra Sen v. Adu Sheikh*, 9 W. R. 602.

15th.—The presumption of law is that possession goes with title. *Vide* (a) *Dharan Singh v. Hara Prasaad Singh*, I. L. R. 12 Cal. 38; (b) *Ramkumar Rai v. Govind Chundra Rai*, I. L. R. 19 Cal. (P. C.) 660; (c) *Mohima Chundra De Sarkar v. Haralal Sarkar*, I. L. R. 3 Cal. 768; (d) *Ananga Manjari Chowdhraïn v. Tripura Soondari Chowdhraïn*, I. L. R. 14 Cal. (P. C.) 740.

16th.—Possession of lands which have never been occupied for cultivation and which are of such a nature and description that no one can be said to be in possession may be presumed rightfully to belong to the parties with whom the title rests. *Vide* *Moochiram Manji v. Biswambhur Rai Chowdhary*, 24 W. R. 410.

17th.—Where a person has, for a long period of time, exercised a proprietary right, which might have had a legal origin by grant or license from the Crown or a private person, and the exercise of which

would naturally have been prevented, if it had not had a legal origin, there is a presumption that such right had a legal origin, and that it was created by a proper instrument which has been lost.—Art. 100, St. Dig.

18*th*.—The occupation of land carries with it an implied agreement on the part of the tenant to manage the land according to the course of good husbandry and the custom of the country.

19*th*.—The hereditary nature of a tenure or taluq may be presumed from evidence of long and uninterrupted enjoyment and of the descent of the tenure from father to son. *Vide* (a) *Gopal Lal Tackoor v. Tilak Chundra Rai*, 3 W. R. (P. C.) 1; (b) *Dhanpat Singh v. Guman Singh*, 11 Moo. I. A. 465; (c) *Satyasarun Ghoshal v. Mohesh Chundra Mitra*, 11 W. R. (P. C.) 10; (d) *Kaldip Narain Singh v. The Government*, 14 Moo. I. A. 247; (e) *Naba Durga Dassi v. Dwarkanath Rai*, 24 W. R. 301.

20*th*.—The owner of a several fishery, when the terms of the grant are unknown, may be presumed to be owner of the soil.

21*st*.—The soil of unnavigable rivers to the middle line of the water with the right of fishing is presumed to belong to the owner of the adjacent land. *Vide* *Crossby v. Lightowler*, L. R. 2 Ch. App. 478; *Becket v. Morris*, L. R. 1 H. L. Sc. 47.

22*nd*.—In navigable rivers and arms of the sea the presumption is that the soil is vested in the Crown, and the fishery in the public.

23*rd*.—The Court of Admiralty recognises certain presumptions, which ought to be borne in mind, as they have the effect of technically shifting the burden of proof. Thus, in cases of collision, if one of the vessels be shown to have been at anchor, that fact so far raises a presumption in her favour, as to impose on the other vessel the necessity of making out her defence. So, if a ship be proved to have been in stays at the time of collision, she is presumed to have been unable to avoid it, and the burden of proof rests on the opposite side to establish, either that the vessel was improperly put in stays, or that the damage was occasioned by stress of weather or by other unavoidable accident. Again, if a salvor's vessel has been injured or lost while engaged in the salvage service, the Court of Admiralty presumes, *prima facie*, that such injury or loss was caused by the necessities of the service, and not by the salvor's default.—Taylor, sec. 206.

**Rebuttable presumptions, not mentioned in the Illustrations.**  
**Criminal cases.**—1. A man is legally to be presumed innocent of crime until proved to be guilty. If a man be accused of crime, he must be proved guilty, and proved so beyond a reasonable doubt.

2. A criminal intent is often presumed from acts which, morally speaking, are susceptible of but one interpretation. The law presumes every act, in itself, unlawful to have been wrongfully intended, till the contrary appears. When, for instance, a party is proved to have laid poison for another, or to have deliberately struck at him with a deadly weapon, or to have knowingly discharged loaded fire-arms at him, it would be absurd to require the prosecutor to show that he intended death or bodily harm to that person. So, where a party deliberately publishes defamatory matter, malice will be presumed.

3. The law presumes guilt from destroying, withholding or fabricating evidence.

**Statutory presumptions.**—Statutory presumptions, properly speaking, do not belong to the Law of Evidence, but arise from the ordinary substantive law on the subjects with which they are concerned. But as they, in a large number of cases, regulate the burden of proof, an attempt is made to enumerate below the most familiar ones.

**Statutory conclusive presumptions.**—1. A declaration made under sec. 6 of the Land Acquisition Act, X of 1870, and published in the Gazette, is conclusive evidence that the land which forms the subject thereof is needed for a public purpose or for a Company.

2. A declaration by a Magistrate to the effect that a proclamation was duly made by a person charged with a warrant-offence, who has absconded, is, under sec. 87 of the Criminal Procedure Code, conclusive evidence of due compliance with the law.

3. The register prepared under sec. 26 of "The Chota Nagpore Tenures Act, II (B. C.) of 1869, is conclusive evidence of all matters recorded therein.

4. According to the Criminal Tribes Act, XXVII of 1871, a notification by the Local Government, under sec. 5 of the Act, is conclusive proof that the provisions of the Act are applicable to the tribes, &c., specified therein.

5. A certificate given to a purchaser at a sale for arrears of land-revenue or of public demands recoverable as land-revenue is, under sec. 8, Act VII (B. C.) of 1868, conclusive evidence that all the necessary notices have been served and posted.

6. A notification under sec. 3 of the Scheduled Districts Act, XIV of 1874, is conclusive, as to what enactments are in force, or not in force, in any Scheduled District.

7. Estoppels are instances of conclusive presumptions.

**Presumptions of Hindu Law.**—The ordinary presumptions of Hindu law are :—

1. That every Hindu family, in its normal state, is joint. Presumably, every such family is joint in food, worship, and estate. *Vide* (a) *Neel Kisto Deb Burmono v. Beer Chunder Thakoor*, 12 W. R. (P. C.) 21; (b) *Bholanath Mahata v. Ajoodhya Persaud Sookool*, 20 W. R. 65; (c) *Dhurm Das Pandey v. Mussumat Shama Sundary Debi*, 3 Moo. I. A. 229; (d) *Gopikrishna Gossain v. Gunga Persaud Gosain*, 6 Moo. I. A. 53; (e) *Naraganty Latchmi Deramah v. Vengama Naidu*, 9 Moo. I. A. 66; (f) *Pran Krishna Pal Chowdhary v. Mathura Mohan Pal Chowdhary*, 10 Moo. I. A. 403.

2. That where the members of a Hindu family live in commensality, eating together, and possessing joint property, all the property they are in possession of is joint property, until it is shown by evidence that one member of the family is possessed of separate property. *Vide* (a) *Dharam Das Pandey v. Mussumat Shama Sundari Debi*, 3 Moo. I. A. 229; (b) *Govinda Mukerji v. Doorga Prasad*, 22 W. R. 248; (c) *Anandi Kunwar v. Khedu Lal*, 14 Moo. I. A. 412.

3. That a joint Hindu family retains that status in the absence of evidence of partition or acts of separation. *Vide* (a) *Mussumat Cheetha v. Baboo Miheen Lal*, 11 Moo. I. A. 369; (b) *Bodh Sing Dudhuria v. Ganesh Chundra Sen*, 19 W. R. 356; (c) *Moro Visianath v. Gonesh Viithal*, 10 Bom. H. C. R. 453.

4. That when a family is separate in residence and food, it is also separate in estate. *Vide* (a) *Kesabram Mahapattar v. Nandkishor Mahapattar*, 3 B. L. R. (A. C.) 7.

5. That a debt incurred by the head of a Hindu family residing together is, under ordinary circumstances, a family debt—*Tandavarya Mudali v. Valli Ammal*, 1 Mad. H. C. R. 398.

6. That where a plaintiff's family is admitted or proved to be a joint Hindu family, but there is no direct evidence as to the nature of the debt claimed by the plaintiff, it is a family debt. *Vide* (a) *Jagmohandas Kilabhai v. Allu Maria Daskul*, 1 L. R. 19 Bom. 339; (b) *Taruck Chunder v. Jodeshur Chunder*, 19 W. R. 178.

7. That a Hindu family is governed ordinarily by the law of its origin, and not by that of its domicile. In the case of Mitakshara family residing in Bengal, the presumption would be in favour of its being governed by Mitakshara law, till the contrary is proved. *Vide* (a) *Surendranath Roy v. Mt. Heramoni Burmonea*, 12 Moo. I. A. 81; (b) *Prithe Sing v. Sheo Sundari*, 8 W. R. 261; (c) *Ram Bromo Pandah v. Kamini Sundari Dasi*, 6 W. R. 295.



8. That an ancient family custom, proved to have existed among Hindus, continues even though the family has migrated—*Surendranath Rai v. Heramoni Burmonea*, 12 Moo. I. A. 81.

9. That when a purchase of real estate is made by a Hindu in the name of his son, the purchase is a *benami* one. The same rule applies in Mahomedan cases. *Vide* (a) *Gopikristo Gosain v. Gunga Persaud Gossain*, 6 Moo. I. A. 53; (b) *Moulvie Sayyud Ushr Ali v. Mussumat Bibi Utaf Fatima*, 13 Moo. I. A. 232; (c) *Mussumat Bibi Nyamat v. Fasl Hossein*, S. D. A. 1859 p. 138; (d) *Rungu Mal v. Bunsidhur*, 5 Dec. N. W. P. p. 147; (e) *Bhagbat Chundra De v. Haro Govind Pal*, 20 W. R. 269; (f) *Naginbhai v. Abdulla*, I. L. R. 6 Bom. 717.

10. The same presumption arises when the purchase is in the name of the wife. *Vide* (a) *Sarnamayi v. Luckmipat Dugar*, 9 W. R. 578; (b) *Chowdhurani v. Tarini Kant Lahiri*, I. L. R. 8 Cal. 545. So, also, when in the name of his own idol (*Brojo Sundari Debya v. Lachmi Kunwari*, 20 W. R. 95).

11. That a child in India, under ordinary circumstances, has his father's religion, and his corresponding civil and social status—*Skinner v. Orde*, 14 Moo. I. A. 309.

12. That the object of endowment by a Hindu for the worship of idols is to preserve the *seba* in the family rather than to confer a benefit on an individual—*Chundra Nath Rai v. Govinda Nath Rai*, 11 B. L. R. 114.

**Presumptions of Mahomedan Law.**—1. In the absence of express contract, Mahomedan dower is presumed to be prompt, demandable at any time, not merely deferred, *i.e.*, demandable on divorce—*Tadya v. Hasanebiyari*, 6 Mad. H. C. R. 9.

2. As to marriage and legitimacy. *Vide* (a) *Ramamani Ammal v. Kalanthe Natchear*, 14 Moo. I. A. 346; (b) *Khajah Hidayutollah v. Rai Jan Khanum*, 3 Moo. I. A. 295; (c) *Ashruf-ood-dowlah Ahmed Hossain Khan v. Hyder Hossain Khan*, 11 Moo. I. A. 94; (d) *Mahomed Banker Hossain Khan v. Shurfoon Nissa Begum*, 8 Moo. I. A. 159; (e) *Mussumat Jarnitull Batool v. Mussumat Hossaine Begum*, 11 Moo. I. A. 194.

3. The English doctrine of satisfaction has been applied to Mahomedan law. When a Mahomedan husband, who had agreed to give his wife a dower of five lakhs of Lucknow rupees, subsequently directed four and a half lakhs *siccu* rupees of Company's paper to be set aside for her, this was presumed to be in satisfaction of dower and not a gift—*Iftikharannessa v. Amjeed Ali Khan*, 7 B. L. R. (P. C.) 643.

## CHAPTER VIII.

## ESTOPPEL.

The subject of estoppels differs from that of presumptions in the circumstance, that an estoppel is a personal disqualification laid upon a person peculiarly circumstanced from proving peculiar facts. A presumption is a rule that a particular inference shall be drawn from particular facts whoever proves them.—Stephen's Int., 176.

Lord Coke divided estoppels into three kinds, namely: 1st—By matter of record; 2nd—By deed; 3rd—*In pais*. This chapter is concerned with estoppels of the last class (*i.e.*, *in pais*). The definition of estoppel given in section 115 is not to be regarded as an exhaustive one, or as laying down a different rule to that which is to be gathered from the English cases; and there are numerous other cases, in addition to those expressly contemplated by the Act, in which the principle of estoppel by representation has been given effect to in the Courts of this country.\*

115. When one person has, by his declaration, act or omission, intentionally caused  
 Estoppel. or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

*Illustration.*

A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it. The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title.

**Foundation of the doctrine of equitable Estoppels by Representation.**—The foundation of the doctrine of equitable estoppel by representation is thus described by Lord Selborne L. C., in *Citizen's Bank of Louisiana v. First National Bank of New Orleans*, L. R. 6 E. and I. A. 352: "The foundation of that doctrine, which is a very important one, and certainly not one likely to be departed from, is this, that if a man, dealing with another for value, makes statements

\* *Vide Sarat Chunder Dey v. Gopal Chunder Laha*, I. L. R. 20 Cal. 296.

to him as to existing facts, which being stated would effect the contract, and without reliance upon which, or without the statement of which, the party would not enter into the contract, and which being otherwise than as they were stated, would leave the *situation* after the contract different from what it would have been, if the representations had not been made; then the person making those representations shall, so far as the powers of a Court of Equity extend, be treated as if the representations were not true, and shall be compelled to make them good. But those must be representations concerning existing facts." The reason of the rule is thus explained by Mr. Smith in his notes to the *Duchess of Kingston's case*, 2 Sm. L. C. 801. "However, it is in nowise unjust or unreasonable, but, on the contrary, in the highest degree reasonable and just, that some solemn mode of declaration should be provided by law, for the purpose of enabling men to bind themselves to the good faith and truth of representations on which other persons are to act. *Interest reipublice ut sit finis litium*; but if matters, which have been once solemnly decided, were to be again drawn into controversy, if facts once solemnly affirmed were to be again denied whenever the affirmant saw his opportunity, the end would never be of litigation and confusion. It is wise, therefore, to provide certain means by which a man may be concluded, not from saying the truth, but from saying that that which, by the intervention of himself or his, has once become accredited for truth, is false. And probably no code, however rude, ever existed without some such provision for the security of men acting, as all men must, upon the representations of others." "At the same time, the Courts have been unwilling to allow men to be entrapped by formal statements and admissions, which were perhaps looked upon as unimportant when made, and by which no one ever was deceived or induced to alter his position. Such estoppels are still, as formerly, considered *odious*." "In its most common aspect, equitable estoppel is founded upon deceit, and has its justification in the duty of the Courts to prevent the accomplishment of fraud. The estoppel consists in holding for truth a representation acted upon, when the person who made it or his privies seek to deny its truth and to deprive the party who has acted upon it of the benefit obtained. The origin of the estoppel is probably to be found in the doctrine of equity that if a representation be made to another who deals upon the faith of it, the former must make the representation good, if he knew or was bound to know it to be false\*"

**The Rule of Law.**—This section contains the rule in *Pickard v. Sears*, 6 A. and E. 474, as interpreted and limited by Parke B., in

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\* *Vide* Bigelow, 5th Ed., 557.

*Freeman v. Cooke*, 6 Bing. 174. The case of *Pickard v. Sears* is described by Mr. Bigelow as bearing the same relation to estoppel *in pais* as the *Duchess of Kingston's case* does to estoppel by record. Denman C. J., in delivering the judgment of the Court, said : " But the rule of law is clear, that, where one by his words or conduct, *wilfully* causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time, and the plaintiff, in this case, might have parted with his interest in the property by verbal gift or sale, without any of those formalities that throw technical difficulties in the way of legal evidence. And we think his conduct, in standing by and giving a kind of sanction to the proceedings under the execution, was a fact of such a nature, that the opinion of the jury ought, in conformity to *Heane v. Rogers* (9 B. and C. 577) and *Graves v. Key* (3 B. and Ad. 313), to have been taken, whether he had not, in point of fact, ceased to be the owner." The rule has been explained in the case of *Freeman v. Cooke*, by Parke B., thus : " That rule was founded on previous authorities, and has been acted upon in some cases since. The principle is stated more broadly by Lord Denman in the case of *Gregg v. Wells* (110 A. and E. 90). The proposition contained in the rule itself, as above laid down in the case of *Pickard v. Sears*, must be considered as established. By the term *wilfully*, however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least, that he *means* his representation to be acted upon, and that it is acted upon accordingly ; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth ; and conduct, by negligence or omission, where there is a duty cast upon a person by usage of trade or otherwise, to disclose the truth, may often have the same effect. As for instance, a retiring partner omitting to inform his customers of the *fact*, in the usual mode, that the continuing partners were no longer authorised to act as his agents, is bound by all contracts made by them with third persons, on the faith of their being so authorised. In truth, in most cases in which the doctrine in *Pickard v. Sears* is to be applied, the representation is such as to amount to the *contract* or *license* of the party making it."

The rule mentioned above results directly from the maxim that *no man shall take advantage of his own wrong*. It is not confined only to cases of transfers of property, but includes all cases of false

representations, fraudulent silence, and culpable negligence, whatever the nature of the transaction may be.

**Extent of the rule mentioned in the Section.**—In the case of *Vishnu v. Krishnan*, I. L. R. 7 Mad. 3, a Full Bench of the Madras High Court said that “the term intentionally was, no doubt, adopted advisedly. By the substitution of it for the term ‘wilfully’ in the rule stated in *Pickard v. Sears*, and explained in *Freeman v. Cooke* and *Cornish v. Abington*, it was possibly the design to exclude cases from the rule in India, to which it might be applied under the terms in which it has been stated by the English Courts.” In this case and in the case of *Gunga Sahai v. Hira Singh*, I. L. R. 2 All. 809, it was laid down that if the element of fraud be wanting, there is no estoppel. There must be deception, and change of conduct in consequence. This limited view of the section has been expressly discountenanced by their Lordships of the Privy Council in the case of *Sarat Chandra Dey v. Gopal Chundra Laha*, I. L. R. 20 Cal. 296. Their Lordships remarked: “Their Lordships are unable to agree in this view. On the contrary, as the rule had been modified in England by there substituting the word ‘intentionally’ in the rule established for the word ‘wilfully,’ which had been previously used, it seems to their Lordships that the term intentionally was used in the Evidence Act, 1872, for the purpose of declaring the law in India to be precisely that of the law of England. A person who, by his declaration, act or omission, had caused another to believe a thing to be true and to act upon that belief, must be held to have done so ‘intentionally’ within the meaning of the statute, if a reasonable man would take the representation to be true, and believe it was meant that he should act upon it. The section of the Evidence Act does not make it a condition of estoppel resulting that the person who, by his declaration or act, has induced the belief on which another has acted, was either committing or seeking to commit a fraud, or that he was acting with a full knowledge of the circumstances and under no mistake or misapprehension. The Court is not warranted or entitled to add any such qualifying conditions to the language of the Act; but even if they had the power of thus virtually interpolating words in the statute which are not to be found there, their Lordships are clearly of opinion that there is neither principle nor authority for any such legal doctrine as would warrant this. The learned counsel who argued the present case on either side were agreed that the terms of the Indian Evidence Act did not enact as law in India anything different from the law of England on the subject of estoppel, and their Lordships entirely adopt that view. The law of this country gives no countenance to the doctrine that in order to create estoppel, the person, whose acts or declarations induced another to act in a

particular way, must have been under no mistake himself, or must have acted with an intention to mislead or deceive. What the law and the Indian statute mainly regard is the position of the person who was induced to act; and the principal on which the law and the statute rest is, that it would be most inequitable and unjust to him that if another, by a representation made, or by conduct amounting to a representation, has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it. If the person who made the statement did so without full knowledge, or under error, *sibi imputet*. It may, in the result, be unfortunate for him, but it would be unjust, even though he acted under error, to throw the consequences on the persons who believed his statement and acted on it as it was intended he should do. The general principle is thus stated by the Lord Chancellor (Campbell) with the full concurrence of Lord Kingsdown in the case of *Cairncross v. Lorimer* (7 Jur. N. S. 149), 1860: 'The doctrine will apply, which is to be found, I believe, in the laws of all civilised nations that if a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct. I am of opinion that, generally speaking, if a party, having an interest to prevent an act being done, has full notice of its having been done, and acquiesces in it so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license.' There is no ground for the suggestion that the person making the representation, which induces another to act, must be influenced by a fraudulent intention, to be found either in the case just referred to or in the leading authorities of *Pickard v. Sears*, *Freeman v. Cooke*, and *Cornish v. Abington*. In the more recent case of *Carr v. The London and North-Western Railway Company* in the Appellate Court of the Common Pleas, the Master of the Rolls (Lord Esher) pointed out that, no doubt, in certain cases, where estoppel is successfully pleaded against a party seeking to act at variance with his previous conduct or declarations on the faith of which another has acted, the original statement may have been made fraudulently; but, as his Lordship explained, a fraudulent intention is by no means necessary to create an estoppel, and accord-

ingly he mentions other cases or classes of cases in which the determining element is not the motive with which the representation has been made, nor the state of knowledge of the party making it, but the effect of the representation as having caused another to act on the faith of it. This case was approved of in the much later case of *Seton, Laing & Co. v. Lafone*, L. R. 19 Q. B. D. 68, by a unanimous judgment of Lord Esher and Lords Justices Fry and Lopes. In that case Lord Esher said: 'An estoppel does not, in itself, give a cause of action; it prevents a person from denying a certain state of facts. One ground of estoppel is where a man makes a fraudulent misrepresentation and another man acts upon it to his detriment. Another may be where a man makes a false statement negligently though without fraud, and another person acts upon it. And there may be circumstances under which, where a misrepresentation is made without fraud and without negligence, there may be an estoppel.' To this statement it appears to their Lordships, it may be added, that there may be statements made, and which have induced another party to do that from which otherwise he would have abstained, which cannot properly be characterised as 'misrepresentations,' as, for example, what occurred in the present case, in which the inference to be drawn from the conduct of Ahmed was either that the *heba* in the favour of Arju Bibi was valid in itself, or at all events that he, as the party having an interest to challenge it, had elected to consent to its being treated as valid."

The rule of estoppel, as laid down in this section, covers the whole ground covered by the theory of part performance. This section does not say that, in order to constitute an estoppel, the acts which a person has been induced to do, must have been acts prejudicial to his own interest. Its terms are sufficiently wide to meet the case of a grant, or who has simply been allowed to remain in possession, on the understanding and belief that the transaction was one of mortgage, and thus every instance of what the English Courts call part-performance would be brought within the Indian rule of estoppel.\* A man may be estopped not only from giving particular evidence, but from doing any act or relying upon any particular argument or contention which the rules of equity and good conscience prevent him from using as against his opponent.†

**The essentials of a valid estoppel.**—From what has been said above, it appears that in order to amount to a valid estoppel under this section, three things are necessary, *viz.*: 1st—There must have been declaration, act or omission which amounts to an intentional

\* *Vide Aakubakhman v. Govindkanji*, I. L. R. 4 Bom. 594.

† *Vide Ganges Manufacturing Co. v. Soorajmull*, I. L. R. 5 Cal. 669.

causing or permitting belief in another; *2nd*—That there must have been belief on the part of that other; *3rd*—There must have been action arising out of that belief, that is to say, the person pleading estoppel must show that he has altered his position by reason of such declaration, act or omission. It is, however, necessary to bear in mind that a statement, in order to create an estoppel, should be clear and unambiguous, and should refer to some state of facts alleged to be at the time actually in existence, and not to promises *de futuro*, nor to propositions of law. It is also necessary to remember that there should be privity between the parties, that is to say, an estoppel is only available between the parties to the representation and those claiming under them. But it is not essential that the intention of the person whose declaration, act or omission has induced another to act, or to abstain from acting, should have been fraudulent, or that he should not have been under a mistake or misapprehension. The determining element in all cases of estoppels is not the motive with which the representation was made, or the state of knowledge of the party making it, but the effect of the representation as having caused another person to act on the faith of it.

In the case of *Carr v. The London and North-Western Railway Co.*, L. R. 10 C. P. 307, Brett J. (Lord Esher) laid down the following four propositions as to estoppels :—

I. A, by words or conduct, wilfully endeavours to cause B to believe in a certain state of facts which A *knows* to be false. Then if B believes in that state of things and acts upon his belief, A having knowingly made a false statement, is estopped from averring afterwards that such a state of things did not in fact exist.

II. A, by conduct of culpable negligence calculated to lead B into the belief of a certain state of facts, causes B to so believe and to act by mistake upon such belief to his prejudice, such conduct of culpable negligence on A's part being the proximate cause of B's so acting. Then A cannot be heard afterwards, as against B, to shew that the state of facts referred to did not exist.

III. A, either in express terms or by conduct, makes a representation to B of the existence of a certain state of facts which he either does not believe to be true or has no positive belief either way, but nevertheless he intends it to be acted upon in a certain way. B does so act to his damage in that belief. Then A is estopped from denying the existence of that state of things.

IV. A so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts intended to



be acted on in a particular way. B does so act in that belief to his damage. Then A may not deny that the facts were as represented.

**Representation.**—The term "*representation*" includes both express and implied statement. It is not necessary that there should be an express statement; whatever word, action or conduct conveys a clear impression as of a fact is embraced in the term. It practically includes silence in certain cases; silence where one is bound to speak is ordinarily equivalent to an admission of the fact. The representation in order to work an estoppel must be of a nature to lead naturally, *i.e.*, to lead a man of prudence, to the action taken : *1st*—In the first place, it must generally be a material statement of fact. It can seldom happen that a statement of opinion or of a proposition of law will conclude the party making it from denying its correctness, except where it is understood to mean nothing but a simple statement of fact ; *2nd*—The representation or concealment must, in the second place, like a recital, in all ordinary cases, have reference to a present or past state of things ; for, if a party make a representation concerning some thing in the future, it must generally be either a mere statement of intention or opinion, uncertain to the knowledge of both parties, or it will come to a contract, with the peculiar consequences of a contract or to a waiver of some term of contract or of the performance of some other kind of duty. The intent of a party, however positive and fixed, is necessarily uncertain as to its fulfilment, and must depend on contingencies, and be subject to be changed and modified by subsequent events and circumstances. On a representation concerning such a matter, no person would have a right to rely, or to regulate his action in relation to any subject in which his interest was involved as upon a fixed certain and definite fact or state of things, permanent in its nature and not liable to change. A person cannot be bound, by any rule of morality or good faith, not to change his intention, nor can he be precluded from showing such a change merely because he has previously represented that his intentions were once different from those which he eventually executed ; *3rd*—The representation must be plain, not doubtful, or matter of questionable inference.\* Certainty is essential to all estoppels. The Courts will not readily suffer a man to be deprived of his property where he had no intention to part with it. The representation cannot be enlarged or acted upon otherwise than according to its terms or natural import and clear meaning ; *4th*—The representation must be material, that is, equally essential to the estoppel. This, however, does not mean that the representation in question must have been the sole

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\* *Vide Rani Mewa Kuwar v. Rani Hulas Kuwar*, 18 B. L. R. (P. C.) 312.

inducement to the change of position ; if it were adequate to the result, that is, if it might have governed the conduct of a prudent man, and if it *did* influence the result, that will be enough, though other inducements operated with it ; 544.—The representation must have been a voluntary act ; and if obtained by the party who has acted upon it, it must have been obtained without artifice. If it has been procured by duress or by fraud, there will be no estoppel upon the party making it, it would seem, though he made it with the full intention that it should be acted upon ; indeed, it is said that where the conduct supposed to have created an estoppel was brought about or directly encouraged by the party alleging the estoppel, no estoppel is created.

**Misrepresentation.**—By misrepresentation is meant a false impression of some fact or set of facts created upon the mind of one person by another, by language, or by language and conduct together, or by conduct alone equivalent to language, where there appears to be no intention to warrant the same.\* Estoppel arising in virtue of a misrepresentation is the converse of an action of deceit. The property or interest claimed by reason of the estoppel corresponds to the damages sought in the action of deceit, and in order to make good the claim of estoppel, the same things are requisite that are necessary to the maintenance of the action mentioned.

**Estoppels arising out of representations made deliberately with a knowledge of their falsehood.**—(a). In the case of *McCance v. The London and North-Western Railway Company*, 7 H. and N. 447, the plaintiff wilfully made a false statement as to the value of certain horses, in order to induce the defendant-company to carry them at a lower rate of freight, and the horses were injured owing to the defective state of the trucks, it was held that the plaintiff was estopped from proving the real value of the horses. Bramwell B. said : “ If there be one principle of law more clear than another, it is this, that where a person has made a *deliberate statement*, with the view to induce another to act, and he has acted upon it, the former is not at liberty to deny the truth of the statement so made.”

(b). A person, who held a mortgage of certain property as security for a loan, represented to an intending purchaser of this property that he had no security over it, and induced him under that belief to buy. It was held that he could not subsequently put his mortgage in force as against that purchaser—*Munnoo Lal v. Chuni Lal*, 21 W. R. (P. C.) 21.

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\* Vide Bigelow, 5th Ed., 556.

(c). A widow held *benami* for husband, during his life, property as to which he had executed a *hebanama* in her favour. After his death, she mortgaged the property, her son representing her in the transaction. After her death, in a suit between rival purchasers of part of the property comprised in the *hebanama*, and in the mortgage, the plaintiff derived his title from the son, having purchased his inherited share of the estate, while the defendants relied on a *purchase* at a sale in execution of a decree obtained by the mortgagee. The son had represented that the *heba* gave a right to his mother to mortgage, and consequently neither he nor his representative in estate could be allowed to deny the truth of his representation, intentionally made on his part, which also had been acted on by the mortgagee, and it made no difference that the son had not had a fraudulent intention. As a result of the estoppel upon the son, any purchaser of mortgagee's interest, at a sale regularly carried out, would have acquired a valid title to the property, although such purchaser might have been fully aware of all the circumstances—*Sarat Chunder Dey v. Gopal Chunder Laha*, I. L. R. 20 Cal. (P. C.) 296.

(d). I purchased a *darpatni*. After his purchase, he sold or professed to sell his *darpatni* to his wife K and his son D. After this sale, the *patnidar* brought a suit for rent against I, who defended the suit, upon the express ground, that he was no longer the tenant, and that he had parted with his interest in the *darpatni* to his wife and son, and stated in his evidence that the sale to his wife and son was an absolute and *bona fide* one; that the *darpatni* really belonged to them; and that he had no right or interest in it. The *patnidar*, plaintiff, failed in that suit, and then brought another suit for the same rent against K and D. He obtained a decree against them, and under that decree the *darpatni* was sold, and the plaintiff himself became the purchaser of it. The purchaser, upon the title thus acquired, brought a suit for rent against the *ijardar* of the *darpatni*. The *ijardar* contended that the real owner was I, and one P. intervened alleging that I mortgaged the *darpatni* to him, and that such proceedings had been taken upon the mortgage that he became entitled to the rent claimed. The High Court held that "inasmuch as the intervening defendant claims under I, and can take no better title than I himself, and as I has directly induced the plaintiff to believe that he had sold his property absolutely to his wife and son, and led him to bring a suit against them for the rent, and under the decree obtained in that suit to purchase their interest in the property, it does not lie in the mouth of I, or any one claiming under him by a subsequent title, to set up a claim to the rent in this suit as against the plaintiff"—*Aunath Nath Deb v.*

*Bishtu Chunder Roy*, I. L. R. 4 Cal. 783. This decision was upheld by the Privy Council. *Vide* I. L. R. 9 Cal. 265. *Vide also Kistiry Mohun Roy v. Mahomed Mujaffar Hossein*, I. L. R. 18 Cal. 188. (On appeal to Privy Council, I. L. R. 22 Cal. 909).

(e). After a plaintiff had obtained a decree, and under it, in execution, arrested his judgment-debtor, the latter filed a petition in Court agreeing not to prefer any appeal against the judgment obtained by the plaintiff, and the judgment-creditor at the same time agreed to release the judgment-debtor from arrest, and to take payment of the sum decreed to him by instalments. An order was passed by the Court embodying this arrangement. The judgment-debtor, in contravention of this arrangement, preferred an appeal. *Held*, that the judgment-debtor having induced the decree-holder to believe, and having expressly undertaken that he would not prefer an appeal, and having, by the representation and undertaking, procured his own release from arrest, was estopped from acting contrary to his deliberate representation and undertaking—*Protab Chunder Dass v. Arathoon*, I. L. R. 8 Cal. 456. *Vide also* (1) *Anunt Dass v. Ashburner*, I. L. R. 1 All. 267; (2) *Moonshi Amir Ali v. Maharani Indurjit Singh*, 9 B. L. R. (P. C.) 460; (3) *Raj Mohan Gossain v. Gour Mohan Gossain*, 4 W. B. (P. C.) 47.

**Estoppels arising out of innocent misrepresentation.**—(a). The principle upon which such estoppels are based is that where the representation, though believed to be true by the party who made it, was under circumstances in which, from his peculiar relation to the facts, he was bound to know the true state of things. The circumstances which should fix knowledge must be peculiar, special, and strong, and may be influenced towards strengthening or taking away the grounds of the estoppel in many ways. Generally speaking, it is often said that a man is presumed to know the truth in regard to facts within his own special means of knowledge. More definitely, the rule has been thus stated: "What a person is bound to know has regard to his particular means of knowledge and to the nature of the representation, and is then subject to the test of the knowledge which a man, paying that attention which every man owes to his neighbour in making a representation, would have acquired in the particular case by the use of such means."\*

(b). In *Horsfall v. Fauntleroy*, 10 B. and C. 755, the plaintiffs circulated a catalogue with certain conditions of sale, a copy of which was transmitted to the defendants, one of which was that payment was to be made on delivery by good bills on London. The defendant's agents bought ivory for them at the sale, and drew bills

\* *Vide* Bigelow, 5th Ed., §11.

for the amount, which the defendants accepted in the belief that the agents had given good bills on London. It appeared that a verbal alteration had been made by the auctioneer at the sale on reading the conditions, and that four months' credit had been given to the defendant's agents as known buyers. The agents having stopped payment, the plaintiffs were held estopped by their catalogue from recovering the value of the ivory.

(c). In *Gould v. The Bacup Local Board*, 50 L. J. (M. C.) 44, a Municipal authority issued a notice in certain terms, it was held that the Board was estopped from taking steps contrary to their declared intention.

**Estoppels arising out of negligence.**—(a). "The principle in regard to negligence having legal consequences appears to be this : *1st*—There must have been a failure to exercise that care or prudence which a man of average care, prudence, or diligence would exercise in the case ; *2nd*—And that general proposition means specifically (a) that the negligent person must at the time owe some duty either to the person affected by the alleged negligence or to the public of which he is one, and (b) that the result, at least in the law of estoppel, has come about in or in immediate connection with the negligence act or omission."

(b). The case of *Seton, Laing & Co. v. Lafone*, L. R. 19 Q. B. D. 68, fully illustrates the principle of culpable negligence. In this case Lord Esher M. R. remarked as follows : "The defendant makes a statement ; it is a statement made in the course of business ; it is a statement made by a wharfinger for the purposes of his business, the substance of it being that certain dye is in his warehouse under his charge as a warehouseman, that the warrants for it are outstanding, and, therefore, upon the production of them the dye will be delivered ; and that the plaintiff is interested in the dye and the holder of the warrants, and therefore bound to pay the rent, and if it is not paid, the goods will be sold. The statement that the dye is in his warehouse being erroneous, the next question is whether it was negligently made. The goods were deposited in the warehouse long before the defendant became owner of it, a fact he would ascertain from the books. There is nothing to shew that he took any pains to ascertain or made any enquiry whatever, whether, after that long interval, they were still in the warehouse. It is alleged that there was no negligence, because there was no duty. I protest that, if a man in the course of business volunteers to make a statement on which it is probable that in the course of business another will act, there is a duty which arises towards the person to whom he makes that statement. There is

clearly a duty not to state a thing which is false to his knowledge, and further than that, I think there is a duty to take reasonable care that the statement shall be correct. It is not stated to be necessary by the terms of the proposition to which I have referred, and I do not think it is necessary that the person making the statement should have *intended* the person to whom he made the statement to act in any particular way upon it . . . . Then the statement being negligently made, the next question is whether the plaintiff believed it, and it seems to me that the obvious inference from the facts is that he did so. Then the next question is, whether the statement was calculated to make him believe in a certain state of facts, and in consequence to do what he did upon the strength of that belief, or to put, what seems to me to be the same question, in other words, whether it was reasonable as a matter of business for the plaintiff to do what he did as a result of his belief in the defendant's statement. It seems to me that the natural result of the defendant's statement is the conclusion in the plaintiff's mind, that if he buys the warrant, he can get the goods, and that he would buy the goods if he thought he could get a good bargain by so doing."

(c). To found an estoppel, the negligence of the defendant should be the proximate cause of the loss sustained by the plaintiff. The expression 'proximate cause' has been explained to mean 'the direct and immediate cause.' *Vide* (1) *Coventry v. The Great Eastern Railway Co.*, L. R. 11 Q. B. D. 776; (2) *Seton v. Lafone*, L. R. H. Q. B. D. 68.

**Estoppels arising out of conduct of culpable negligence or omission.**—(a). If a man, having a title to an estate, which is offered for sale, and knowing his title stands by and encourages the sale, or does not forbid it, and thereby another person is induced to purchase the estate, under the supposition that the title is good, the former so standing by, and being silent, will be bound by the sale, and neither he nor his privies will be at liberty to dispute the validity of the purchase.—Story's Eq. Jur., sec. 385. *Vide* also Taylor, sec. 774.

(b). It was held in the case of *Baswantapa Shidapa v. Ranees and Malkhana*, I. L. R. 9 Bom. 86, that the rule mentioned above "implies a wilful misleading of the purchaser by some breach of duty on the owner's part. In this case there was nothing more than mere quiescence on the part of Tayawa."

(c). There is an obligation to truth in speech and act, but no obligation to speak or act where no confidence is given or accepted,

merely for the purpose of guarding or furthering the interests of strangers proceeding wholly *in invitum*, and with an omission to inquire, which is equivalent to knowledge. See remarks of Lord Selborne in *Agra Bank v. Barry*, L. R. 7 E. and J. App. 157.

**Culpable negligence.—Prior incumbrances.**—(a). A hypothecation bond executed in 1878 by the husband (deceased) of defendant No. 1 to secure a debt due by him to a partner of the plaintiff was assigned to the latter in 1888. In 1882, the plaintiff, who was aware of the existence of this instrument, brought the land comprised in it to sale in execution of a money-decree obtained by him against the executant, and defendant No. 3 became the purchaser. At the time of the sale, the plaintiff gave no notice of the existence of the encumbrance. In a suit to recover the principal and interest due on the hypothecation bond; *held*, that the plaintiff was estopped from recovering the secured debt against the land. The ground of decision was that it was plaintiff himself who led intending purchasers to believe that the property was offered for sale, free of encumbrances, and that plaintiff by concealing the existence of a lien, of which he was aware, led the purchaser to pay full value for the property. He is, therefore, estopped from now denying that the sale took place free of encumbrances—*Kasturi v. Venkata Chalapathi*, I. L. R. 15 Mad. 412.

(b). The plaintiff sued to realise his security under a mortgage executed to him by defendant No. 1, by sale of the mortgaged premises which were in the possession of defendants Nos. 2 and 3. It appeared that the plaintiff had previously attached and brought to sale the mortgaged premises in execution of a decree against defendant No. 1, and that the other defendants had purchased at the Court sale, without notice of the plaintiff's mortgage, which was not referred to in the attachment lists or sale certificates. *Held*, that the plaintiff was estopped from setting up his present claim—*Jaganatha v. Ganji Reddi*, I. L. R. 15 Mad. 303.

(c). Where a judgment-creditor sells property as that of his judgment-debtor, he is estopped from setting up a previous mortgage which had been created in his own favour, of which he has given no notice, and in ignorance of which the purchaser has bid for the property and paid the full price. *Vide* (1) *Agarchand Gumanchand v. Rukhma Hanmant*, I. L. R. 12 Bom. 678; (2) *Dullab Sirkar v. Krishna Kumar*, 3 B. L. R. 407; (3) *Tukaram v. Ram Chundra*, I. L. R. 1 Bom. 314; (4) *Tinnapa Chetti v. Murugappa Chetti*, I. L. R. 7 Mad. 107; (5) *Hari v. Lakshman*, I. L. R. 5 Bom. 614; (6) *Tukaram bin Atmaram v. Chundra bin Budharam*, I. L. R. 6 Mad. 314.

(d). Where a decree is obtained upon his mortgage by a mortgagee, and the mortgaged property is sold under the decree for the purpose of paying off the mortgage, the interest of both mortgagor and mortgagee passes to the purchaser. The mortgagee is estopped from disputing that such is the effect of the sale, so far as his interest is concerned, although the officer of the Court may only have described the sale as one of the right, title, and interest of the mortgagor. It is not the practice, in the moffusil, to require the mortgagee to convey to the purchaser. The transfer takes place by estoppel. *Vide* (1) *Kheeraj Jusrup v. Lingaya*, I. L. R. 5 Bom. 2; (2) *Sheshgiri v. Salvador Vas*, I. L. R. 5 Bom. 5; (3) *Sheikh Abdulla Saiba v. Haji Abdulla*, I. L. R. 5 Bom. 8; (4) *Raoji v. Krishnaji*, 11 Bom. H. C. R. 142.

**Estoppels arising out of conduct of parties.**—(a). Where a prior mortgagee attested the execution of the deed mortgaging the property a second time, and being aware of the contents of the deed kept silence, and thus led the second mortgagee to think that the property was not encumbered, and to advance his money on the security of it, which the second mortgagee would not have done had he been aware of the existence of the prior mortgage, such silence was held to be conduct which amounted to constructive fraud on the part of the prior mortgagee and deprived him of his right to priority—*Salamat Ali v. Budh Singh*, I. L. R. 1 All. 303.

(b). Where the plaintiffs by their conduct led the defendant to believe that they claimed no right to a certain trade-mark, and that it was open to the defendant to adopt it, and by his industry secured a wide popularity for it in the Indian market; *held*, that the plaintiffs were estopped from denying the defendant's right to use the trade-mark in the Indian market—*Laverque v. Hooper*, I. L. R. 8 Mad. 149.

(c). A trustee, alleging that the trust property consisting of land was his own property, mortgaged it. The mortgagee took the mortgage in good faith, for valuable consideration, and without notice of the trust. The mortgagee obtained a decree against the trustee for the sale of the land, and the land was sold in execution of that decree. The trustee subsequently brought a suit to recover the land from the purchaser on the ground that it was trust property, and that he had no power to transfer it. To this suit none of the beneficiaries under the trust were parties. *Held*, that the plaintiff was estopped by his conduct from recovering possession of the land—*Gulzar Ali v. Fida Ali*, I. L. R. 6 All. 24.

(d). In a suit to recover principal and interest on a bond which mortgaged the obligee's share in three villages, K, S and P, the defence was that plaintiff had paid himself by becoming the purchaser at a



sale in execution of another decree of the obligee's rights in K at a price inadequate to the fair value. It was found that, at the sale in question, the bids were made on the understanding that the property was burdened with the plaintiff's bond debt. *Held*, that as the plaintiff chose to give out to the world of buyers that he intended to burden the village K with the payment of the whole sum due to him, and took advantage of the lowness of the bids to buy the property himself, he could not now be allowed to proceed against the other properties—*Byjonnath Sahoy v. Doolhun Binwanath Koer*, 24 W. R. 83.

(e). L, in execution of a decree against S, a member of an undivided Hindu family, for a personal debt, attached the interest of S in certain land and objected to the attachment on the ground that the property was not family property or partible. The objection was disallowed under sec. 246, Act VIII of 1859. No suit was brought by K within one year from the date of the order, but L, who purchased the right of S, in the lands attached and sold, did bring a suit within a year from the date of the order to obtain what he had bought at the Court sale from K and others. *Held*, that K was estopped from again pleading that the same property was not family property or partible—*Bailurkrishna Raw v. Lakshmana Sharbhogue*, I. L. R. 4 Mad. 302.

(f). A Hindu widow, professing to have authority from her husband to do so, took the second defendant in adoption, brought him up as her adopted son, and permitted him to perform the funeral ceremonies of her husband. Land to which she otherwise would have been entitled was attached in execution of a decree against defendant No. 2. She now sued to release the attachment, alleging that the adoption was bad, as having been unauthorized. *Held*, that the plaintiff was estopped from raising this contention—*Kannamal v. Virasami*, I. L. R. 15 Mad. 486. But see *Parvatibamma v. Ramakrishna Rau*, I. L. R. 18 Mad. 145.

(g). In the case of *Raoji Vinayakrao Jaggannath Shankersett v. Lakshmibai*, I. L. R. 11 Bom. 381, the defendant had taken the plaintiff in adoption, brought him up, and married him as the adopted son of her husband, and had put herself forward as his mother. She could not now, when the plaintiff might have lost all right in his natural family, assert that she had not validly adopted him.

(h). The *bona fide* holder for value of a forged *hundi*, to whom, after it had been dishonoured, it had been transferred by endorsement, by the payees, who, at the time of endorsement, knew that the *hundi* was forged, sued the payees on the *hundi* to recover the amount he had paid them for it. *Held*, that the payees were estopped from setting up the forgery of the *hundi* as a bar to the suit—*Bishen Chand v. Rajendro Kishore Singh*, I. L. R. 5 All. 302.

(i). At a sale for arrears of revenue, Government purchased a pergunnah containing a certain talook belonging to A. The talook was not cancelled, and the Government made successive temporary settlements with A, in which his talookdari right was recognized. The right and interests of Government in the pergunnah were afterwards sold to B, who ousted A. A afterwards joined with C in taking a putni lease of the same land which he had in the talook. *Held*, in a suit by A against B and C that this conduct estopped him from recovering possession of the dependent talook from which he was ousted by B—*Gooroo Pershad Chuckerbutty v. Baninath Chuckerbutty*, 2 C. L. R. 216.

(j). A Hindu widow, in possession of her deceased husband's separate landed estate, her deceased husband's mistress and his illegitimate daughter, and the next reversioner to such estate, with the object of adjusting family disputes, entered into an arrangement by an instrument in writing for the distribution of such estate. A remoter reversioner to such estate was a witness to such instrument and took a prominent part in making such arrangement, and the same had his full consent. *Held*, that such remoter reversioner was estopped by such conduct from afterwards questioning the legality and genuine character of such distribution and the validity of assignments made by the persons who shared in such distribution—*Sia Dasi v. Gur Sahai*, I. L. R. 3 All. 362.

(k). Three brothers—K, M and N, were members of a joint Hindu family. M and N went abroad obtaining appointments, but used to remit moneys from time to time for the support of the joint family. K remained at home to look after the affairs of the family, and managed the whole property and applied the rents to the support of the family. In 1881, K mortgaged the property. In 1885, M and N brought this suit to recover possession of the house and lands, alleging that they were their self-acquired property, and that K had no power to alienate them. *Held*, that the plaintiffs having held out K as the manager of the whole estate, so as to induce outsiders dealing with him to believe that he had authority to mortgage the whole interest of the three brothers in the property, they (the plaintiffs) were estopped from contending that the mortgages effected by K were not binding on their shares, if K did, as a matter of fact, borrow the money for the benefit of the family—*Krishnaji Mahadeo Mahajan v. Moro Mahadeo Mahajan*, I. L. R. 15 Bom. 32.

(l). A yeomiahdar died leaving a brother, who was then out of India. Shortly before his death, he made an invalid assignment of his holding to a third person who performed the service, and granted pattas of the land. The holding was resumable on failure of the

service. The brother of the late yeomiahdar returned after three years and obtained registration of his title. He now filed this suit to enforce acceptance of pattas tendered by him to the raiyats, who had already accepted pattas from and executed *muchalkas* to the assignee. *Held*, that the suit was not maintainable, as under the circumstances the plaintiff's conduct justified the tenant's belief that the assignee was entitled to collect rent from them until the assignment was questioned by the plaintiff and notice of his title given to them—*Khadar v. Subramanya*, I. L. R. 11 Mad. 12.

(m). Where a Court, on the application of a decreeholder, made an order for execution, and such order was set aside on appeal, on the ground that such Court had no jurisdiction to entertain the application; *held*, that the decreeholder, having invoked the jurisdiction of the Court, was estopped from calling in question an order subsequently passed by it, directing him to refund a sum realized under the order for execution—*Govind Vaman v. Sakharam Ramchandra*, I. L. R. 3 Bom. 42. *Vide also Gyan Chunder Sen v. Durga Churn Sen*, I. L. R. 7 Cal. 318.

(n). An agreement was entered into between the Commissioners of the town of V. and the defendant, farming the tolls of the town of V. to the defendant for one year. The agreement was duly signed by the defendant, but was not executed under the seal by the Commissioners as required by Madras Act III of 1871. In a suit by the President on behalf of the Commissioners, brought after the expiry of the year, for a portion of the sum due to them by the defendant; *held*, that inasmuch as the plaintiff had fully performed all things to be performed on his part, and both parties had acted under the agreement, though it was not formally executed by the Commissioners, and as the defendant had the full benefit of the contract, it would be contrary to equity and good conscience to allow him to set up as ground of defence that there was no contract in point of law—*Goodrich v. Venkanna*, I. L. R. 2 Mad. 104.

(o). Where the parties to a suit have, by mutual agreement, made certain terms and informed the Court of them, and the Court has sanctioned the arrangement and made an order in conformity with it, and the agreement has been acted upon, neither party is at liberty to resile from it. The question whether such an agreement does or does not violate the rule that a Court cannot add to its decree becomes, under the circumstances, one which the Court will not enter into; the party who seeks to raise such question being estopped by his own conduct and the action of the Court taken thereunder—*Sheo Golam Lal v. Beni Prasad*, I. L. R. 5 Cal. 27. *Vide also Denanath Sen v. Gooroo Charn Pal*, 21 W. R. 310.

(p). If goods are in a man's possession, order or disposition under such circumstances as to enable him by means of them to obtain false credit, the owner who has permitted him to obtain that false credit must suffer the penalty of losing his goods for the benefit of those who have given the credit—*In re F. H. Marshall T. Boileau v. A. B. Miller*, 10 C. L. R. 591.

(q). The master of a vessel signed a bill of lading, which stated that four casks were marked with the word 'Calcutta' as the port of destination. In an action for damages for landing the casks at Colombo, it was held that the master was estopped from saying that they were not marked with the word 'Calcutta'—*Madhav Chunder De v. Law*, 13 B. L. R. 394.

(r). An offer of sale was made to a person having a right of pre-emption, but he refused it and consented to a sale to a stranger. It was held that he could not afterwards set up his right of pre-emption—*Braja Kishor Sarma v. Kirti Chundra Sarma*, 15 W. R. 247.

(s). Where a defendant made no objection at the time to the purchaser of the plaintiff's interest in the suit substituting his name on the record for that of the plaintiff, he was not afterwards allowed to contend that the suit had thereby abated—*Birchundra Rai Mahapattar v. Bansidhar Rai Mahapattar*, 12 W. R. 87.

(t). On the 10th of February 1872, one S. R. mortgaged to the plaintiff an undefined one biswa share out of three biswas owned by him. On the 20th of March 1877, J. P. and G. P. brought to sale in execution of money-decrees against S. R., two out of those three biswas, which two biswas were purchased by the defendant. The sale was confirmed on the 23rd of April 1877. Out of the proceeds of that sale Rs. 1,464-14-9 were appropriated by the plaintiff in part satisfaction of his mortgage. On the 16th of April 1877, the plaintiff sued the auction-purchaser for sale of one biswa in satisfaction of his mortgage. *Held*, that even if it could be shown (which it could not) that the particular biswa mortgaged to the plaintiff was one of those which had passed into the defendant's possession, the plaintiff was estopped by his previous conduct from suing to bring it to sale under his mortgage—*Jhinka v. Baldeo Sahai*, 1 L. R. 14 All. 509.

(u). The service of a notice of ejectment under sec. 36 of Act XII of 1861 is, as between the person who causes such notice to be served and the person on whom it is served, a conclusive admission by the former of the existence between them of the relationship of landlord and tenant; and the landlord cannot afterwards sue in the civil Court to eject the same tenant from the same land, on the ground

that he is not a tenant, but a mere trespasser—*Baldeo Singh v. Imdad Ali*, I. L. R. 15 All. 189.

(v). A and B were joint owners of a certain piece of land. In the year 1874, A leased his share to the defendants for a term ending in October 1880, for the purpose of growing indigo. At the same time B leased his share to the defendant for the same purpose for a term ending in October 1881. A and B sold their shares to the plaintiff in the year 1879. In January 1881, plaintiff sued to prevent the defendant from growing indigo on the land and for *khas* possession, on the ground that the lease of A's share having expired, the defendant was not entitled to retain the land for the purpose of growing indigo under the lease given by B. *Held*, that the plaintiff having, by his own act, become the owner of both shares, he could not, as owner of one share, exercise a right which he was precluded from exercising as owner of the other share, and that the suit should have been dismissed—*Holloway v. Muddon Mohan Lall*, I. L. R. 8 Cal. 446.

(w). M, a judgment-creditor, having attached certain land of his judgment-debtor, entered by mistake one parcel thereof in the proclamation of sale as two parcels, having different numbers in the list of property to be sold. The parcel was put up for sale and purchased by the decreeholder himself, and was subsequently put up for sale and purchased by T. In a suit brought by T against M for entering on the land; *held*, that M was estopped by his conduct from setting up his title as purchaser against T—*Tinnappa Chetti v. Murugappa Chetti*, I. L. R. 7 Mad. 107.

**Estoppels arising out of conduct of indifference or acquiescence.**—(a). It must now be regarded as settled that an estoppel may arise as against persons who have not made any misrepresentation and whose conduct is free from fraud or negligence, and who may have acted *bona fide* without being fully aware either of their legal rights or of the probable consequences of their conduct; but as against whom inferences may reasonably have been drawn upon which others may have been induced to act. "If a person having a right and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act."\* In the case of *Bisheshar v. Muirhead*, I. L. R. 14 All. 362, their Lordships of the Allahabad High Court remarked: "Undoubtedly, if the owner of a piece of land stands by, while

\* *Vide Duke of Leeds v. Earl of Amherst*, 2 Phil. 117.

another person professes to sell that land to a third party, and he does not interfere, but allows that other person to hold himself out to be the owner of the land and to make a transfer of it, he is not to be heard afterwards for the purpose of destroying that purchaser's title by asserting the contrary, though he may upset that title, if he can show either that the purchaser had notice of his title, constructive or actual, or that circumstances existed at the time of the purchase, which, as a reasonable man, should have put him upon his guard and suggested inquiry, which inquiry, if made, would have resulted in his ascertaining the title of the true owner. In that case, supposing he makes out such a case, the purchaser cannot hold on to his purchase, and the true owner is entitled to his property." The rule above laid down seems to be based upon the consideration that equity considers it to be the duty of such a person to be active and to state his adverse title, and that it would be dishonest in him to remain wilfully passive in order to profit by the mistake, which he might have prevented.

(b). If parties will stand by and permit another to hold himself out to the world as the real proprietor of an estate, when he, in reality, is not so, and thus induce parties innocent of the fraud to lend their money upon such faith, they are not entitled to any consideration from a Court of Equity and good conscience—*Nundun Lal v. Mr. William Tayler*, 5 W. R. 37.

(c). In the case of *Uda Begam v. Imam-ud-din*, I. L. R. 1 All. 82, the Allahabad High Court held that "on the whole it may be taken as the law both of Courts of Law and Equity that mere laches, short of the period prescribed by the statute of Limitation, is no bar whatever to the enforcement of a right absolutely vested in the plaintiff in the period of suit; but where there is more than mere laches, where there is conduct or language inducing a reasonable belief that a right is foregone, the party who acts upon the belief so induced, and whose position is altered by this belief, is entitled to plead acquiescence, and the plea, if sufficiently proved, ought to be held a good answer to an action, although the plaintiff may have brought the suit within the period prescribed by the law of limitation."

(d). Standing by in silence will not bar a man from asserting a title of record in the public registry or other like office, so long as no act is done to mislead the other party; there is no duty to speak in such a case. Nor can pure silence (i.e., silence without fraud) operate as an estoppel to assert one's rights over property when the party supposed to be estopped was, at the time, in possession, for possession is notice. It is not enough to raise an estoppel that there was an opportunity to speak, which was not embraced; there must have been

an imperative duty to speak. Nor is any duty generated by the mere fact that a man is aware that some one may act to his prejudice, if the true state of things is not disclosed.

(e). The defendant entered into occupation of certain land with the permission of the plaintiff, who was the real owner, and erected buildings and otherwise expended money upon it. The plaintiff and the defendant were relations, and lived near each other. The plaintiff constantly visited the land and knew what the defendant was doing, but made no objection. Subsequently, the plaintiff being anxious to obtain from the defendant an acknowledgment of his (the plaintiff's) title, induced (but without misrepresentation or fraud) the defendant to sign a rent-note. This rent-note was, in terms, a lease for one year. Subsequently to the execution of the rent-note, the defendant erected other buildings. The plaintiff knew it, but made no objection. *Held*, that the plaintiff could not recover possession of the land, or require the removal of the buildings, without recouping the defendant the money he had expended. The plaintiff was estopped from denying the claim of defendant. He had stood by in silence, while his tenant had spent money on his land—*Dattatraya Rayaji Pai v. Shridhar Narayan Pai*, I. L. R. 17 Bom. 736.

**When no Estoppel arises.**—The rule is fundamental that unless the representation of the party to be estopped has also been really acted upon, the other party acting differently, that is to say, from the way he would otherwise have acted, so that, to deny the representation would prejudice him, no estoppel arises. Unless the representation is in some way acted upon, unequivocally, as tested by the first step taken, the estoppel cannot arise, nor will any estoppel arise when the party acting upon the representation has done only what he was legally bound to do. There can be no estoppel where the party claiming one is obliged, before changing his position, to enquire for the existence of other facts to make the inducement sufficient, and to rely upon them also in acting. In other words, though the party may, no doubt, act upon any one of several representations or inducements from different sources, it will not answer for him to put together two severally insufficient inducements from different and independent sources. But it is to be borne in mind that what may not, under the circumstances, have amounted to an estoppel for want of justifiable action upon the representation, may become an estoppel by ratification or misleading acquiescence.

**Instances in which no Estoppel has been held to arise.**—(a). A defendant is not estopped by a statement made by him in another suit in which plaintiff was no party—*Khanto Monee Debi v. Koomodini Debi*, 25 W. R. 69. *Vide also* (1) *Bisessuri Debi v. Jankee*

*Das Mohant*, 1 W. R. 162 ; (2) *J. P. Wise v. Must. Ruban Khatoon*, 19 W. R. 299.

(b). If a man takes out probate of a will, his heirs are not estopped from disputing the will—*Mahomed Mudun v. Khodesunnissa*, 2 W. R. 181.

(c). Subsequently to the sale of one-third share in a village, the vendee applied for partition of the share. A co-sharer, who had a right of pre-emption in respect of the sale, made no objection to this application, and the partition was effected. The co-sharer afterwards set up a claim to pre-emption. *Held*, that there was nothing in the conduct of the pre-emptor which could amount to estoppel, or to a waiver of his right of pre-emption—*Thamman Singh v. Jamal-ud-din*, I. L. R. 7 All. 442.

(d). A secret purchase *benami* of shares in a village does not constitute the purchaser a co-sharer for the purposes of pre-emption, either under the Muhammedan law or under the provisions of a *Wajib-ul-arz*, so as to enable him, upon the strength of the interest so acquired, to defeat an otherwise unquestionable presumptive right preferred by a duly recorded shareholder, who had no notice, direct or constructive, of his title, and asserted immediately upon his purchase of a share, for the first time, in his true character—*Beni Shankar Shelhat v. Mahpal Bahadur Singh*, I. L. R. 9 All. 480.

(e). The mere fact that the defendant described himself in the instrument, on which the suit was brought, as a trader, would not of itself estop him from pleading at the trial, that he was an agriculturist, and entitled to the protection of the Dekkhan Agriculturists' Relief Act (XVII of 1879). There must be evidence to show that by describing himself as a 'trader,' he represented himself as a trader, and intended that the representation should be acted on by the plaintiff—*Kadappa v. Marianda*, I. L. R. 17 Bom. 227.

(f). In the case of *Mina Konwari v. Juggut Setani*, I. L. R. 10 Cal. 196, the Privy Council held that to petition for the postponement of a sale in execution of a decree stating that the decreeholder had executed the decree against the judgment-debtor, and got the judgment-debtor's property attached, is not an intentional causing or permitting the decreeholder to believe that the decree can be legally executed, and occasions no estoppel within the meaning of this section. The judgment-debtor can, notwithstanding his having filed such a petition, maintain that execution is barred by limitation, and the proceedings in execution have been without jurisdiction. *Vide also Thacoor Mahatab Deo v. Leelanand Singh*, I. L. R. 7 Cal. 613.



(g). Where the plaintiff, in a suit for redemption of a usufructuary mortgage, was the original mortgagor, who had, by a registered instrument, assigned his interest in the mortgaged property to another, and the assignee did not apply to be made a party to the suit, but put forward or consented to have put forward the original mortgagor as the person entitled to redeem. *Held*, that as there was nothing in that litigation to show that the defendant-mortgagee was in any way induced to alter his position or to do any act which he would not otherwise have done in consequence of the assignor's conduct, the latter was not estopped by this section or by any principle of equitable estoppel from afterwards suing on his own account for redemption—*Muhammad Sami-ud-din Khan v. Mannu Lal*, I. L. R. 11 All. 386.

(h). A decreeholder, at a sale in execution of his decree, purchased a zemindary share belonging to his judgment-debtors. Afterwards, in execution of a subsequent decree held by another person, the same, with other property, was again put up for sale. Prior to the sale, the subsequent decreeholder applied to the officer conducting it, stating the fact of the sale and purchase under the previous decree, and requesting that the sale should be confined to a portion of the judgment-debtors' interest, which had not been already sold. This application was disallowed, and the whole interest of the judgment-debtors put up for sale, and the prior decreeholder, who was present, made a bid. Ultimately, however, a portion of the property was withdrawn, and the remainder only was sold, including part of the property sold in execution of the prior decree. The prior decreeholder did not bid again. Afterwards the prior decreeholder brought a suit for a declaration that the share which he had purchased at the sale in execution of his decree was not affected by the auction-sale in execution of the subsequent decree. *Held*, that the plaintiff was not estopped from claiming such a declaration by his conduct in bidding at the sale at which the defendant had purchased, inasmuch as it could not be said that by bidding he meant to show that he had no title to the property or had waived his title, or that he had encouraged the defendant to purchase, or had power to forbid the sale—*Gheran v. Kunj Behari*, I. L. R. 9 All. 413.

(i). At a sale in execution of a decree for enforcement of a hypothecation-bond, the decreeholder, by permission of the executing Court, made bids, but the property was purchased by another. At that time the decreeholder held a prior registered incumbrance, which he did not personally announce. In a suit brought by him subsequently to enforce this incumbrance, it was contended on behalf of the auction-purchaser that he was estopped by his conduct from setting it up as

against her. *Held*, that there was no estoppel—*Banwari Das v. Muhammad Mashiat*, I. L. R. 9 All. 690.

(j). A claimed certain property from B, the daughter of C, on the ground that on the death of C, it had descended to D, as the heir of C, and produced a kobala containing a recital that on the death of C, who had died childless, it had descended to D. *Held*, that A was not estopped from proving that C had left a son E, who survived him, and that D was entitled to the property as E's heir, and that D's heir could give the title to such property—*Gour Mony Debia v. Krishna Chunder Sanyal*, I. L. R. 4 Cal. 397.

(k). A brought a suit against B, to have it declared that B possessed no right of way over his lands. This suit was dismissed, and B obtained a decree establishing his right. Previous to the institution of this suit, A had mortgaged the same lands to C, who, after the suit, caused the lands to be sold under his mortgage, and became the purchaser at the auction-sale. In a suit by C against B to have it declared, that no such right of way existed over the lands. *Held*, that C was not estopped by the previous decision against A, his mortgagor, from again raising the question of the validity of the right of way over the said lands—*Bonomales Nag v. Koylash Chunder Dey*, I. L. R. 4 Cal. 692.

(l). The plaintiff sued the defendant on mortgages executed to the plaintiff by the adoptive mothers of the defendant (who were also defendants) subsequently to his adoption. The plaintiff contended that the mortgages had become effectual as against the defendant by reason of his subsequent conduct. Evidence was given that he had promised his adoptive mothers to redeem the mortgages, and that he had stood by and allowed the plaintiff to carry out the provisions of the mortgage-deeds to his own detriment by paying maintenance to the defendant's adoptive mothers, and by paying off certain mortgages which had been created by them previously to the adoption of the defendant. *Held*, that knowledge on the part of the defendant that the plaintiff was carrying out the provisions of the mortgage-deeds, and his allowing the plaintiff to do so, did not estop him from disputing them afterwards, for it was no part of his duty to step in and protect the plaintiff against the consequences of his own unauthorized dealings with his property—*Shiddeshwar v. Ramchandrar*, I. L. R. 6 Bom. 463.

(m). Defendants Nos. 1 and 2 were sued by a creditor of their undivided granduncle D as his legal representatives, and a decree was obtained against them as such. In execution of that decree, the house in dispute was put up for sale and purchased by the plaintiff.

After satisfying the decree, the surplus of the sale-proceeds was paid to the defendants, who received it and divided it between themselves. Plaintiff having been obstructed by the defendants in obtaining possession of the house, brought the present suit to recover possession. The Appellate Court held that the defendant's omission to set up their title to the property in question at the execution-sale and the acceptance of the surplus of the proceeds of sale estopped them from impeaching the sale and setting up their title. The High Court reversed the decree of the lower Appellate Court, and held that the defendants were not estopped from setting up their title. Proceedings in execution are *in invitum* as regards the judgment-debtor, and he is in no way called upon to notice them. It was not suggested that the defendants took any part in the execution proceedings, or stood by so as to induce bidders to suppose that they claimed no interest other than as representatives of the original judgment-debtor, or that their silence misled the bidders at the sale. As to the reception of the residue of the purchase-money after satisfaction of the judgment-debt, it took place after the sale was completed—*Gurupadapa v. Irapa*, I. L. R. 14 Bom. 558.

(n). A, a Hindu, died leaving him surviving a mother B and three sisters. A had a brother P, who had been given in adoption to his maternal uncle R. On A's death, his property devolved on his mother R. B mortgaged the property to the defendant. The mortgage-bond was attested by P, who described himself as the adopted son of R. The defendant obtained a decree on the mortgage, and himself became the auction-purchaser at the execution sale. Thereupon, A's sisters sued as reversionary heirs, for a declaration that the sale to the defendant was valid only to the extent of B's life-interest in the property sold. The defendant pleaded that P's adoption was invalid, that on A's death the property vested in P, and that the plaintiffs had, therefore, no interest in the property in dispute. The Court of first instance allowed these pleas and dismissed the suit. The Court of Appeal held that the description in the mortgage-bond, that P was the adopted son of R, amounted to an admission of the adoption by the defendant (mortgagee), and that he was, therefore, estopped from contesting the adoption. *Held*, that the defendant was not estopped. The mere fact that P was described in the mortgage-bond as R's adopted son, was not any evidence of an admission; and even if it were, it was not conclusive proof of the adoption, sec. 31 *ante*. *Held* further, that the fact treated by the lower Appellate Court as an estoppel had no such effect, as it had not caused or permitted the plaintiffs to believe the adoption to be valid, and to act upon such belief—*Yashvant Puttu Shenvi v. Radhabai*, I. L. R. 14 Bom. 312.

(o). Defendants, who have represented the fact of an adoption which they erroneously conclude to be an adoption valid in law, cannot be charged with misrepresentation so far as the fact is concerned, and are not estopped from setting up the true facts of the case—*Gopee Lall v. Mussamat Sree Chundraoolee Buhoojee*, 19 W. R. (P. C.) 12.

(p). A defendant is not estopped by a statement made by him in another suit in which plaintiff was no party—*Khanto Moni Debi v. Koomodini Debi*, 25 W. R. 69.

(q). In the case of *Abdul Rahim v. Madhavrao Apaji*, I. L. R. 14 Bom. 78, it was contended that the understanding of the parties up to 1866 was that the mortgage had been converted into a sale, and that the property had passed to the defendant by purchase, and, therefore, the plaintiffs were prevented from redeeming it. *Held*, that such understanding did not operate as an estoppel or prevent the mortgagors (plaintiffs) from redeeming their property.

(r). Under a deed dated in 1879, the occupancy-tenants of land in a village sold their occupancy rights, and the zemindars thereupon instituted a suit for a declaration that the sale-deed was invalid under sec. 9 of Act XVIII of 1873 (the N. W. P. Rent Act in force in 1879), and for ejectment of the vendees, who had obtained possession of the land. It was found that the zemindars had consented to the sale to the vendees, and received from them arrears of rent due on the holding by the vendors, and had recognised them as tenants. *Held*, that as sec. 115 of the Evidence Act implies that no declaration, act, or omission will amount to an estoppel, unless it has caused the person, whom it concerns, to alter his position, and to this he must both believe in the facts stated or suggested by it, and must act upon such belief; that in the present case it could not be said that the vendees were misled by the fact that the zemindars were consenting parties to the sale-deed, that they could not plead ignorance, that the deed was unlawful and void, that it had not been shown that they acted upon the zemindars' agreement to take no action, so as to alter their position with reference to the land, and that under these circumstances the zemindars were not estopped from maintaining that the sale-deed was invalid—*Jhingari Tewari v. Durga*, I. L. R. 7 All. (F.B.) 878.

(s). In a suit for possession of land brought against a tenant who is really a trespasser, the defendant merely, by alleging tenancy in his written statement, does not preclude himself from setting up the defence of the law of limitation—*Dinomoni Debi v. Doorga Prosad Masoomdar*, 21 W. R. (F. B.) 70. *Vide also Maidin Saiba v. Nagapa*, I. L. R. 7 Bom. 96.

(t). Judgment-debtors, against whom execution is sought, are competent to object that it cannot proceed *benami*; the party interested being himself one of the judgment-debtors, whenever the facts come to notice, and are not debarred, by having suffered execution at one instance, from setting up the objection where a further application is made—*Obhoy Charn Roy Chowdhary v. Nobin Chunder Roy Chowdhary*, 23 W. R. 95.

(u). A having assured his life in the defendant-company, by an endorsement thereon, assigned the policy to B, no consideration being stated. The assignee died having, up to the time of his death, paid all premiums as they became due. On his death the premiums were paid by his executors, the plaintiffs, until the death of the assured, when the payment of the amount due under the policy was demanded from the defendant-company, which, however, refused to accede to the demand unless the consent of the legal representatives of the assured was obtained. *Held*, that unless the policy had been legally assigned, and the assignment had been recognised by the company, or unless there had been an equitable assignment, and it could be shown that the holders of the policy had given valuable consideration for it, the company was entitled to insist that the legal representative should be made a party to the suit, and that the defendant-company was not estopped by their conduct to raise such objection—*Rajnarain Bose v. The Universal Life Assurance Co.*, I. L. R. 7 Cal. 594.

(v). A Hindu father adopted a son, and afterwards, while this first adopted son was alive, adopted a second son, such second adoption being, however, invalid by Hindu law. The first adopted son, after he came of age, acquiesced in a division of the property made by the father between his two adopted sons. It was held that, although such first adopted son was bound by this acquiescence with regard to the property of which the father had the power of disposing by an act *inter vivos* without his consent, he was not bound thereby as to the disposition of *ancestral* property—*Rangama v. Atchama*, 4 Moo. I. A. 1.

(w). The service of notice of foreclosure on the occupant of mortgaged property (a person who claimed as purchaser from the mortgagor) was held not to estop the mortgagee from disputing such occupant's title to redeem—*Prannath Rai Chowdhari v. Rukia Begum*, 7 Moo. I. A. 359.

(x). Where the plaintiff sued for possession of certain property in right of the next reversionary heir, and for setting aside a deed of sale executed by the widow of the last full owner, and it appeared that the plaintiff's vendor had executed this deed as general muktear,

executor, and adopted son of the widow, making a general renunciation of title as muktear, but had, after the widow's death, derived title from the said reversionary heir, it was held that the plaintiff and his vendor were not estopped, the fair construction of the deed being that the vendor was only selling what his principal had to sell, there being no representation that he was selling on his own account, and the plaintiff not denying the truth of any fact represented in the deed—*Nurul Hossein v. Sheo Sahai*, I. L. R. 20 Cal. 1.

(y). The plaintiff, claiming a remote reversionary interest in the estates of a deceased Hindu, sued for a declaration of the invalidity of an adoption made by the widow. It appeared that the nearer reversioners (who were in the first instance joined as defendants in the suit) refused to call in question the validity of the adoption, and that the plaintiff himself had concurred in it at the time when it took place. *Held*, that the plaintiff was not estopped from impugning the adoption by reason of his conduct at the time it took place, as no estoppel can arise from ignorance of law which both parties must be presumed to know, and as according to true Hindu theory, adoption is both a religious and a secular act on which rests the conventional Hindu belief that a valid adoption generates filial relation and religious competency to make funeral and annual offerings with efficacy—*Gurulingaswami v. Ramalakshamma*, I. L. R. 18 Mad. 53. *Vide also Pichuvayyan v. Subbayyan*, I. L. R. 13 Mad. 128.

(z). A childless Hindu widow, aged 19, agreed with the plaintiff's father to adopt the plaintiff, stating that her husband, who died at the age of 12, had given her authority to adopt. Subsequently she adopted the plaintiff and had his *upanayanum* performed in the adoptive family next day, and administered her husband's property as the minor's guardian for about 18 months, when she repudiated the adoption and refused to maintain the plaintiff. *Held*, that the adoption being invalid on the ground that the widow had not, as a fact, acted under authority from her husband, she was not estopped from denying the adoption by the fact of her having treated it as effective for the period of 18 months. In order that estoppel by conduct may raise an invalid adoption to the level of a valid adoption, there must have been a course of conduct long continued on the part of the adopting family, and the situation of the adoptee in his original family must then become so altered that it would be impossible to restore him to it—*Parvatibayamma v. Ramkrishna Rau*, I. L. R. 18 Mad. 145. *Vide also Kuverji v. Babai*, I. L. R. 19 Bom. 374.

(aa). Between the two surviving brothers of a Mitakshara family, the action of the elder to the younger, who had been born deaf and

dumb, was such as to recognise for some years that the latter had a joint interest in the family property. The proper inference to be drawn from this was that the elder treated his brother as a member of the family, and entitled to equal rights until it had become clear that his disqualification would never be removed by his being cured. Their Lordships would not infer that there was an intention shown by the acts of the elder to waive the rights accruing to him in consequence of this disqualification, nor would they hold that his acts operated to create a new title in the younger. Their Lordships said that it would not be reasonable, or conducive to the peace and welfare of families, to construe acts done out of kindness and affection to the disadvantage of the doer of them, by inferring a gift when it is plain that no gift could have been intended—*Lala Muddun Gopal Lal v. Khikhinda Koer*, I. L. R. 18 Cal. (P.C.) 341.

(bb). Certain land belonging to the applicant, a minor, was taken by the Municipality of Hubli under the Land Acquisition Act (X of 1870). The mamlatdar of Hubli, who was an *ex-officio* member of the Municipal Committee, took part in the negotiations for the purchase of the land. He also gave evidence as to its value in the inquiry before the Collector. As the price offered by the Collector was not accepted by the applicant, the matter was referred to the District Judge, under sec. 15 of the Act, for the purpose of determining the amount of compensation. On this reference, the mamlatdar acted as an assessor appointed by the Collector, and was also examined as a witness as to the value of the land. But no objection was taken to his acting as an assessor. *Held*, that the minor applicant was not estopped from objecting to the competency of the mamlatdar by the fact that his guardian had not raised any such objection in the Court below, and might, therefore, be taken to have waived it. Assuming that there was a waiver, it could not bind the minor, as it was not for his benefit—*Swamirao v. The Collector of Dharwar*, I. L. R. 17 Bom. 299. (*Kashinath v. The Collector of Poona*, I. L. R. 8 Bom. 553, followed).

(cc). The plaintiff paid a house-tax, at the rate of Rs. 6, for the year 1890, without any protest, when the tax was sought to be levied from the plaintiff at the same rate for the year 1891, he objected to the levy as illegal and excessive, and paid the tax under protest. He then sued to recover what he alleged was an excess charge of Rs. 5 in respect of the tax for 1891. *Held*, that the suit was not barred—*Pitamberdas v. Jambusur Town Municipality*, I. L. R. 17 Bom. 510.

**Estoppels arising in cases of Benami Transactions.**—(a). The general rule of law that the real nature of a transaction may be

shown is modified by the principle of estoppel in favour of innocent third parties, whether purchasers, mortgagees, or creditors whose acts have been influenced by the conduct of the real owner in permitting the ostensible owner to appear to all the world as the sole equitable owner. The principle is founded upon the presumption that the real owner is a party to the transaction between his *benamidar* and the third party, and rests upon the fact that the latter was induced to believe the property to be the *benamidar's* and to act upon that belief to his disadvantage, and the law would not allow the real owner to turn round upon such third party and allege that his title is different from what he has caused it to appear to be where others are innocently induced to acquire rights in derogation of the secret or undisclosed claims of those who cause such action, the rights so acquired are secure. Such rights do not depend upon the actual title or right or authority of the party with whom they have directly dealt, but are derived from conduct of the real owner, which precludes him from disputing against them, the existence of the title or right or power which he caused or allowed to appear to be vested in the party making the sale. But the real owner may, as against the *benamidar*, establish the trust existing in his own favour, or may plead it in answer to a claim set up by the *benamidar*. And creditors of the real owner may proceed against his property in the hands of a *benamidar*.

(b). In the case of *Ram Coomar Koondoo v. McQueen*, 18 W. R. 166, their Lordships of the Privy Council laid it down that "It is a principle of natural equity, which must be universally applicable, that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it, for value, from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing either that he had direct notice, or something which amounts to constructive notice, of the real title, or that there existed circumstances which ought to have put him upon an inquiry, that, if prosecuted, would have led to a discovery of it." *Vide also Mahomed Moruff Hossein v. Kissori Mohun Roy*, I. L. R. 22 Cal. (P. C.) 909.

(c). A husband who puts his wife into the position of being the true owner of an estate, and allows her to deal with the world as the true owner, deprives himself of the right to set up, or rely on, his *benami* title—*Nidhu Singh v. Bisso Nath Dass*, 24 W. R. 79. *Vide also Bene Prosaud v. Baboo Man Singh*, 8 W. R. 67.

(d). Where property is held *benami* and the ostensible owner assents to its being disposed of to the prejudice of the real owner, the latter



cannot be allowed to object, the fraud being a consequence of his own act—*Brojonath Ghose v. Koylash Chunder Banerji*, 9 W. R. 593. Vide also (1) *Mr. L. Rennie v. Gunga Narain Chowdhary*, 3 W. R. 10; (2) *Rani Mohinee Dassi v. Prankomar*, 3 W. R. 88.

(e). If property is purchased in the name of a *benamidar*, and the *indicia* of ownership are placed in his hands, the true owner can only get rid of the effect of the alienation by the ostensible owner, by showing that it was made without his acquiescence, and that the purchaser took with notice of that fact—*Bhugwan Dass v. Upooch Singh*, 10 W. R. 185.

(f). Where the husband, during his lifetime, did in every way, both publicly and privately, whenever called upon to make any representation on the subject, always represent that certain immoveable property was his wife's, the purchaser from her could not, after his death, be equitably turned out of the property in favour of his heirs. The heirs, after his death, would be as much bound by the father's misrepresentations as he would have been during his lifetime—*Luchman Chunder Geer Gosain v. Kalicharan Singh*, 19 W. R. (P. C.) 292. Vide also (1) *Chunder Kumar v. Hurbuns Sahai*, I. L. R. 16 Cal. 137; (2) *Purikheet Sahoo v. Radha Kishen Sahoo*, 3 W. R. 221; (3) *Kaleenath Kur v. Doyal Kisto Deb*, 12 W. R. 87.

**When no Estoppel has been held to arise out of benami transactions for defrauding creditors.**—(a). Parties are not precluded from showing what was the real nature of the transaction, although it might have been entered into for the purpose of setting up against creditors an apparent ownership different from the real ownership. In many of these cases the object of a *benami* transaction is to obtain what may be called a shield against a creditor; but notwithstanding this, the parties are not precluded from showing that it was not intended that the property should pass by the instrument creating the *benami*, and that, in truth, it still remained in the person who professed to part with it—*Sreemutty Debi v. Bimola Sundari*, 21 W. R. 424. Vide also (1) *Ramsaran Singh v. Mussamut Pran Peary*, 13 Moo. I. A. 551; (2) *Mussamut Oodey Koowar v. Mussamut Ladoo*, 13 Moo. I. A. 588; (3) *Bykunt Nath Sen v. Goboollah Sikdar*, 24 W. R. 392; (4) *Chenvirappa v. Puitappa*, I. L. R. 11 Bom. 708; (5) *Srinath Ray v. Bindoo Bashini Debi*, 20 W. R. 112; (6) *Chool Bibi v. Goor Sarun Dass*, 18 W. R. 485; (7) *Mukim Mullick v. Ramjan Sardar*, 9 C. L. R. 64; (8) *Param Singh v. Lalji Mal*, I. L. R. 1 All. 403; (9) *Gopinath Naik v. Jadoo Ghose*, 23 W. R. 42.

**Purchaser at execution sale not estopped by conduct of judgment-debtor.**—A purchaser at a sale in execution of a decree is in

a different position to a purchaser at a private sale, and acquires the title of the judgment-debtor, not through the judgment-debtor, but by operation of law, and adversely to him, consequently he will not be estopped by the previous conduct of the debtor in respect of the property mortgaged, for estoppel is purely a personal bar operating against the person whose conduct constitutes it, and against his privies and representatives—*Vide* (1) *Banshi Chander Sen v. Enayet Ali*, I. L. R. 20 Cal. 236 ; (2) *Dhirendra Nath Sanyal v. Ramkumar Ghosh*, I. L. R. 7 Cal. 107 ; (3) *Lala Prabhu Lal v. Mylne*, I. L. R. 14 Cal. 401.

**Agents.**—The rule of estoppel between parties covers the misrepresentations of agents, even agents of corporations, when made in the scope of their employment. Where an agency really exists, the principal is estopped from denying the truth of the agents' statements, express or tacit, just as if he had himself made them, subject to the same limitations that would prevail in that case.

**Administrators and Executors.**—The acts and admissions of one of several administrators, which amount to an estoppel against him, will work as an estoppel against all, as administrators are regarded in the light of an individual person. This rule applies to executors also.

**Cestui que trust.**—The misrepresentation of a trustee in respect of the trust estate, to one having notice that it is such, will not work an estoppel upon an innocent *cestui que trust*.

**Infants and Married Women.**—(a). Parties under disability, as infants and married women, are not estopped, unless their conduct has been intentional, and in contemplation of law, fraudulent.

(b). The vendees in a suit to enforce a right of pre-emption set up as a defence to the suit that the sale was invalid, on the ground that they were minors, and therefore incompetent to contract. *Held*, that as they had paid their money to the vendor, and the conveyance had been perfected, and they were in possession of the property, they were estopped from urging such ground—*Khem Karan v. Har Dayal*, I. L. R. 2 All. 37.

116. No tenant of immoveable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immoveable property ; and no person

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who came upon any immoveable property by the license of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such license was given.

**Scope of the Section.**—The estoppels between landlord and tenant arise out of the contract between the parties. The principle upon which such cases rest is one of the broadest in the law ; to wit, that one who has received property or money from another shall not dispute the title of that person or his right to do what he has done. Where the relation of landlord and tenant has been created, the lessee is not allowed to question his lessor's title during the continuance of the tenancy, though he may confess and avoid it by showing that the tenancy has expired. The provision contained in this section does not debar the tenant from contending that the title of his landlord has been lost, but only precludes him from asserting during the continuance of the tenancy that his landlord had no title at the commencement of the tenancy.\* The estoppel continues during the continuance of the tenancy.

A tenant may show that his landlord had no title at a date previous to the commencement of his tenancy, or that since the commencement of his tenancy, the title of the landlord has expired or been defeated, as by showing that his landlord's estate was for the lifetime of some person, who is since dead, or that he was a tenant-at-will, and the tenancy has been concluded.†

**Origin of the Doctrine of Estoppel of Tenant.**—"The conclusion appears to be justified that the origin and character of the modern estoppel of the tenant is to be found in this ancient action of assumpsit for use and occupation. In this form of action what was sought to be recovered was not technically rent, but compensation from day to day for actual enjoyment. But to the maintenance of the action, the relation of landlord and tenant must have been established ; and when established, the modern estoppel *in pais* arose. *Enjoyment by permission* is the foundation of the action, and is therefore the foundation of the rule that a tenant shall not be permitted to dispute the title of his landlord. Two conditions, then, are essential to the existence of the estoppel : first, possession ; secondly, permission ; when these conditions are present, the estoppel arises."—Bigelow, 5th Ed., 508.

\* *Vide* I. L. R. 2 Mad. 226 ; I. L. R. 12 Mad. 422.

† *Vide* Taylor, sec. 102.

**Classification of Tenant's Estoppel.**—The following classification of estoppels between landlord and tenant has been given by Mr. A. P. Caspersz, in his Tagore Law Lectures for 1893, p. 102 :—

“ I.—The relationship of landlord and tenant is created—

- (A) where the landlord has let the tenant into possession of the land (a) by written contract,\* or (b) by verbal contract.

The tenant cannot deny that his landlord had a title at the time he was let into possession, but he may plead—

- (i) that he has given notice to the landlord that the latter's title has expired, or has been defeated by title paramount, e.g., avoided by sale for arrears of revenue, and that he will, in future, claim under another title ;
- (ii) that he has openly surrendered the land to the landlord ;

- (B) and may be inferred from the payment of rent, attornment, or other circumstances.†

The same estoppel and the same defences apply.

The tenant may, in addition, shew mistake.

II.—Where the landlord claims under a title derived from the person who let the tenant into possession. This may be—

- (a) by assignment (gift, sale, devise, and lease) ;
- (b) by inheritance, including adoption—

- (i) where the tenant has attorned to the landlord, he may, under certain circumstances, shew that the title is not really in the landlord, but in some other person ;
- (ii) where there has been no attornment, the question will be whether the landlord has succeeded in proving his title.”

**At the beginning of the Tenancy.**—The words “ at the beginning of the tenancy ” must be held to apply only to cases where tenants are put into possession by the person to whom they have attorned,

\* *Vide* (1) *Brewer v. Palmer*, 3 Esp. 213 ; (2) *Ramsbottom v. Mortley*, 2 M. and S. 445.

† *Vide* (1) *Panton v. Jones*, 3 Camp. 872 ; (2) *Allason v. Stark*, 9 A. and E. 255 ; (3) *Doe d. Harvey v. Francis*, 3 M. and Rob. 57 ; (4) *Bani Madhav Ghose v. Thakoor Dass Mondul*, 6 W. R. (F. B.) 71 ; (5) *Obhoy Govind Chowdhry v. Beejoy Govind Chowdhry*, 9 W. R. 102 ; (6) *Vasudeb Daft v. Babaji Kanu*, 8 Bom. H. C. R. A. C. 175 ; (7) *Cooper v. Blandy*, 1 Bing. N. C. 45 ; (8) *Doe d. Marlow v. Wiggins*, 4 Q. B. 367.

not to cases in which the tenant is already in possession—*Lal Mahomed v. Kellanus*, I. L. R. 11 Cal. 519.

**Denial of Landlord's Title.**—(a). This section does not debar one who has once been a tenant from contending that the title of his landlord has been lost or that his tenancy has determined. It precludes him only during the continuance of the tenancy from contending that his landlord had no title at the commencement of the tenancy—*Ammu v. Rama Krishna Sastri*, I. L. R. 2 Mad. 226. *Vide* also (1) *Subbaraya v. Krishnappa*, I. L. R. 12 Mad. 422; (2) *Burn & Co. v. Bishomayi Dassi*, 14 W. R. 85; (3) *Mohun Mathu v. Shameul Huda*, 21 W. R. 5; (4) *Gopanund Jha v. Gorind Prasad* 12 W. R. 109.

(b). In *Mountroy v. Collier*, 1 E. and B. 630, Earle J. remarked: "There are numerous authorities to shew that a tenant is not estopped from shewing that his landlord's title has expired, and justice requires that he should be permitted to do so; for a tenant is liable to the person who has the real title, and may be forced to pay him, either in an action for use and occupation, if there has been a fresh demise or an arrangement equivalent to one, or in trespass for the mesne profits. It would be unjust if, being so liable, he could not shew that as a defence."

(c). In *Doe d. Higginbotham v. Burton*, 11 Ad. and E. 307, Lord Denman observed: "Supposing the facts to be as above stated, it is clear that the lessor of the plaintiff never had any legal estate, and he relies on the rule with regard to landlord and tenant. That rule is fully established, *viz.*, that the tenant cannot deny that the person, by whom he was let into possession, had title at that time; but he may shew that such title is determined—*Doe d. Knight v. Lady Smythe*, 4 M. and S. 347. With respect to the title of a person to whom the tenant has paid rent, but by whom he was not let into possession, he is not concluded by such payment of rent if he can show that it was paid under a mistake. The tenant, therefore, may be said to satisfy the rule when he admits that, at the time when he was let into possession, the person who so let him in was mortgagor in possession, not treated as trespasser, and so had title to confer on him, the tenant, legal possession; and yet may go on to show that subsequently he has been treated as a trespasser, whereby his (mortgagor's) title and the tenant's rightful possession under him has been determined."

(d). In *Cooper v. Blandy*, 1 Bing. N. C. 45, Bosanquet J. remarked: "As a general rule, it is not competent to a tenant, after submitting to a distress or payment of rent, to dispute his landlord's title. There are exceptions to that rule, but this is not one of them. It

is not the case where a paramount title has been established, the landlord's title has not expired, nor has there been any payment by mistake. It is nothing more than the case of a tenant picking a hole in the title of a person to whom his predecessors have paid rent without objection."

(e). Sir Barnes Peacock, in delivering the judgment of the Full Bench in *Bani Madhub Ghose v. Thacoor Dass Mondul*, B. L. R. Sup. Vol. 588, observed : "According to English law if a man takes land from another as his tenant, he is estopped from denying the title of that person. But if he takes land from one person and afterwards pays rent to another, believing that other to be the representative of the person from whom he took the land, he is not estopped, in a suit for rent subsequently becoming due, from proving that the person to whom he so paid rent was not the legal representative of the person from whom he took ; for example, if a man pays rent to another believing him to be the heir-at-law of his deceased landlord, and afterwards discovers that he is not the heir-at-law, or that the landlord left a will, the tenant, in a suit for subsequent arrears of rent, would not be estopped from showing that he paid the former arrears under a mistake, and that the person to whom he so paid had no title. The admission of a man's representative character by payment of rent to him is not conclusive, although it may amount to *prima facie* evidence. It is, like all *prima facie* evidence, liable to be rebutted, and the tenant is not estopped from rebutting it if he can."

(f). In the case of *Cornish v. Searell*, 8 B. and C. 471, Bayley J. observed : "It has been said that the defendant, having agreed to become tenant to the plaintiffs, cannot dispute their title. If the defendant had received possession from them, he could not have disputed their title. In *Rogers v. Pitcher*, 6 Taunt. 202, and *Gravenor v. Woodhouse*, 1 Bing. 38, the distinction is pointed out between the case where a person has actually received possession from one who has no title, and the case where he has merely attorned, through mistake, to one who has no title. In the former case the tenant cannot (except under very special circumstances) dispute the title : in the latter he may."

(g). Where a ryot, being in possession of a certain holding, executed a kabuliat, and paid rent for it to the plaintiff, who claimed it under a derivative title from the last owner, it was held that he was not estopped from disputing the plaintiff's title—*Lal Mahomed v. Kellanus*, I. L. R. 11 Cal. 519.

(h). In a suit for rent, based on a kabuliat, the tenant is not estopped from denying that the landlord, mentioned in the kabuliat,

is the real landlord, and alleging that the title in the landlord, mentioned in the kabuliat, is only a *benami* or fictitious title. *Vide Donzell v. Kedarnath Chuskerbutty*, 20 W. R. 352; *Bepin Behary Chowdhary v. Ram Chundra Roy*, 5 B. L. R. 234. It seems that the doctrine of estoppel mentioned in this section does not apply to *benamidars*.

(i). A tenant is not prevented from questioning the title of the alleged assignee of his admitted landlord—*Rani Tillessurri Kooer v. Rani Ashmed Kooer*, 24 W. R. 101.

(j). The payment for some years by tenants of a quit-rent levied from their landlord by the Government does not estop the former when better informed of their rights from contesting the title of the latter—*Jeshingbhai v. Hataji*, I. L. R. 4 Bom. 79.

**Estoppels by Payment of Rent.**—(a). The limits of the rule of estoppel by payment of rent are stated by Lord Cranworth in *Attorney-General v. Stephens*, 6 De G. M. and G. 111. In order to make the payment of rent operate as an estoppel, it is essential to make out that the payments have been made as for rent due in respect of land held as a tenant—*quic quid solvitur, solvitur secundum animum solventis*; and if, on looking to the facts, it is plain that the payments have been made (*secundum animum solventium*) not for rent, but on another account, the doctrine of estoppel arising from the payment of rent has no place.

(b). Payment of rent would ordinarily create an estoppel, but where a tenancy is attempted to be established by mere payment of rent, without any proof of an actual demise or of the tenants having been let into possession by the person to whom the payment was made, evidence is always admissible on the part of the tenant to explain the payment of rent and to show on whose behalf such rent was received—*Doe d. Harvey v. Francis*, 2 M. and Rob. 57. *Vide also Gravenor v. Woodhouse*, 1 Bing. 38.

(c). Where the plaintiff claimed as mortgagee in possession of the defendant's lessor to recover arrears of rent and for ejectment, and the defendant had acknowledged that the plaintiff was in possession, and had on several occasions paid rent to him, it was held that the defendant, having in fact attorned to the plaintiff, as his landlord, could not be allowed to question the validity of his title on the ground that the mortgage-bond had not been duly registered—*Shams Ahmud v. Goolam Mohemooddein*, 3 N. W. P. (H. C.) 153.

(d). In an ejectment suit in respect of a julkar in a navigable river, the defendant, if he had paid rent to the plaintiff or his predecessors, is precluded from raising a defence, that the plaintiff cannot have an

exclusive right of fishery in a navigable river—*Gour Hari Mal v. Amirunnessa Khatoon*, 11 C. L. R. 9.

**Other Instances of Tenant's Estoppel.**—(a). In the case of *Patel Kilabhai Lallumbhai v. Hargovan Mansukh*, I. L. R. 19 Bom. 133, it was held that the defendants (tenants) having executed the *kabuliat* could not deny the plaintiff's title as a ground for refusing to give up possession.

(b). A person taking a lease from one of several co-sharers cannot dispute his lessor's exclusive title to receive the rent or sue in ejectment—*Jamsedji Sorabji v. Lakshmiram Rajaram*, I. L. R. 13 Bom. 323.

**Estoppels against the Landlord.**—(a). In the case of *Downs v. Cooper*, 2 Q. B. (A. and E.) 256, Lord Denman C. J. said: "It appeared to me that if a tenant is estopped from denying the title of the landlord who gives him possession, the landlord must also be estopped from treating, as his tenant, him whom he has required to enter into that relation with another instead of himself."

(b). Upon the principle laid down by Lord Kingsdown in *Ramden v. Dyson*, L. R. 1 E. and I. A. 129, it may be held as settled that where a landlord has allowed his tenants to erect buildings in the hope or encouragement that they will obtain an extended term or an allowance for the expenditure, an estoppel may be raised in favour of the tenants, and the landlord may be precluded from saying that he did not excite such an expectation.

(c). In the case of *Kunhammed v. Narayanan Mussad*, I. L. R. 12 Mad. 320, the Madras High Court held upon a finding that the landlord had stood by while the character of the holding was being altered, and had thereby caused a belief that the change had his approval, that the tenant was entitled to compensation for his improvements.

(d). Two leases in respect of a 5-anna 6-gunda share and an 8-anna share of an estate respectively were granted to the defendant. Under the first, the defendant was entitled to grow indigo up to October 1880, and under the other up to October 1881. The plaintiffs having purchased the interests of the lessors in such leases, on the expiration of the first, gave the defendant notice to quit, and subsequently filed a suit to eject him from the estate. *Held*, that the plaintiffs were not entitled as owners of the 8-anna interest, to sue to stop the defendant's cultivation, inasmuch as the lease in respect of that share had not expired; nor could they do so, as owners of the 5-anna 6-gunda interest, inasmuch as it would be inequitable, that, as owners of one interest in the estate, they



should do anything which would render their acts as owners of another interest abortive, and the advantages purchased by the tenant for valuable consideration practically valueless—*F. Holloway v. Hurdey Narain*, 10 C. L. R. 281.

(e). Where a landlord, with full knowledge of the facts, accepted rent from his tenant's mortgagee, it was held that he was thereby estopped from disputing the mortgage—*Gunga Bissen v. Ram Gut Rai*, 2 N. W. P. R. 49.

(f). The plaintiff having sued to obtain possession of certain land which the defendant held as tenant, and in respect of which he had, for some years, paid rent, the defendant alleged that prior to the time when he became tenant, the plaintiff had, for good consideration, conveyed to him the premises leased, together with other property. This conveyance was found to be a mere *benami* transaction. *Held*, that the plaintiff was not estopped from asserting the tenancy, and, under the circumstances, was entitled to recover—*Sabuktulla v. Hari*, 10 C. L. R. 199.

(g). In the case of *Jhinguri v. Durga*, I. L. R. 7 All. (F. B.) 878, it was held that the landlord was not estopped by reason of having received rent from saying that the tenant has derived his title under a conveyance opposed to the express terms of the law.

(h). In this connection refer to the following cases :—

1. *Shibadas Bandopadhyaya v. Bamondas Mukhapadhyaya*, 8 B. L. R. 237.
2. *Banimadhav Banerji v. Joykishen Mukerji*, 7 B. L. R. 152.
3. *Durga Prasad Misser v. Brindabun Sukul*, 7 B. L. R. 159.
4. *Uda Begam v. Imam-ud-din*, I. L. R. 1 All. 82.
5. *Bisheshur v. Myrhead*, I. L. R. 14 All. 362.
6. *Onkarapa v. Subaji Pandurang*, I. L. R. 15 Bom. 71.
7. *In the matter of Tacoor Chunder Paramanick*, B. L. R. Sup. Vol. 595.
8. *Dunn v. Spurrier*, 7 Ves. 236.
9. *De Bussche v. Alt*, L. R. 8 Ch. D. 286.
10. *Lamare v. Dixon*, L. R. 6 H. L. 414.

117. No acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw such bill or to endorse it; nor shall any bailee

Estoppel of  
acceptor of bill of  
exchange, bailee  
or licensee.

or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or license commenced, authority to make such bailment or grant such license.

*Explanation (1).*—The acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn.

*Explanation (2).*—If a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor.

**The Negotiable Instruments' Act, XXVI of 1881.**—Sec. 120 provides that a maker of a promissory note, a drawer of a bill of exchange or cheque, and an acceptor of a bill of exchange for the honour of the drawer are, in a suit by a holder in due course, estopped from denying the validity of the instrument as originally made or drawn.

Sec. 121 provides that a maker of a promissory note and an acceptor of a bill of exchange payable to, or to the order of, a specified person, are, in a suit thereon by the holder in due course, estopped from denying the payee's capacity at the date of the note or bill to endorse the same.

Sec. 122 enacts that an endorser of a negotiable instrument is, in a suit thereon by a subsequent holder, estopped from denying the signature or capacity to contract of any prior party to the instrument.

**Bailments.**—See Chapter IX, secs. 148—181 of The Indian Contract Act, IX of 1872.

According to the English law, a bailee, who has once acknowledged the title of the bailor, is precluded from setting up the title of a third party, to the article bailed, except in cases where the bailor has obtained the article fraudulently or tortiously from the third person, and where the bailee is able to show that he was, when he acknowledged the bailor's title ignorant of the fraudulent or tortious mode in which the article had been obtained, and also that the third party has made a claim to the article. It seems, however, that a

bailee, when sued by his bailor, may plead that the bailor's title was bad, and that he had delivered the article bailed to the rightful owner.

**Bill of Exchange.**—(a). "The acceptance of a bill of exchange is also deemed a conclusive admission, as against the acceptor, of the signature of the drawer, and of his capacity to draw, and, if the bill be payable to the order of the drawer, of his capacity to indorse; and, if it be drawn by procuration, of the authority of the agent to draw in the name of the principal; and it matters not, in this respect, whether the bill be drawn before or after the acceptance."\* But the acceptor does not necessarily admit the signature of the payee or any other indorser, though these indorsements may have been on the bill at the time of acceptance, nor that the agent, who has drawn a bill *per* procuration payable to the order of the principal, had authority to indorse. If the bill is accepted in blank, the acceptor may not deny the fact that the drawer indorsed it.† When a forged bill is made payable to the order of the drawer, the acceptor may deny the genuineness of the indorsement.‡

(b). "Under the present section, the estoppel extends only to exclude a denial of the drawer's authority to draw or indorse; but the acceptor might, it would appear, be estopped from denying the genuineness of the drawer's signature, under sec. 115, as against any person whom his acceptance had induced to accredit the bill. The acceptor of a bill is not estopped from denying the signature of the payee, or of an indorsee."—Cun. Ev., 7th Ed., 321.

(c). If a partner consents to a bill being drawn in the firm's name, he may be taken to have conclusively established against himself that the indorsing was necessary for the purposes of the firm, and that his partner had the same authority as if the business of the firm required drawing and indorsing bills—*Lewis v. Reilly*, 1 Q. B. (N. S.) 349.

(d). In the case of *Sambhoo Nath Ghose v. Jadunath Chatterji*, 2 Hyde Rep. 259, their Lordships said that when the analogy between native *Hundis* and English Bills of Exchange is complete, the English law is to be applied.

**License.**—The licensee cannot act under his license, and at the same time repudiate it. But although a licensee of a patent cannot usually question its validity during the continuance of the license, he is entitled to have the ambit of the patent, or the field covered by the specification, ascertained, so as to shew that what he has

\* *Vide* Taylor, secs. 778 and 851.

† *L. and S. W. Bank v. Wentworth*, L. R. 5 Exc. D. 96.

‡ *Bytes on Bills of Exchange*, 11th Ed., 200.

done, does not come within the limits of the patent. "The position of a licensee, who, under a license, is working a patent-right for which another has got a patent, is very much analogous indeed to the position of a tenant of lands, who has taken a lease of those lands from another. So long as the lease remains in force, and the tenant has not been evicted from the land, he is estopped from denying that his lessor had a title to that land. When the lease is at an end, the man who was formerly a tenant, but has now ceased to be so, may shew that it was altogether a mistake to have taken that lease, and that the land really belonged to him; but during the continuance of the lease, he cannot shew anything of the sort; it must be taken as against him that the lessor had a title to the land. Now, a person, who takes a license from a patentee, is bound upon the same principle and in exactly the same way. . . . . The tenant under a lease is at liberty to shew that the parcel of land which he and the lessor are disputing about was never comprised in the lease at all. . . . . So may a licensee, under a patent, shew that although he accepted the license, and worked the patent, and the patentee could never, therefore, so long as that license was in existence, bring an action against him as an infringer, yet the particular thing which he has done was not a part of what was included in the patent at all; but that he has done it as one of the general public might have done it, and therefore is not bound to pay royalty for it. If he has used that which is the patent, and which his license authorises him to use without the patentee being able to claim against him for infringement, because the license would include it, then, like a tenant under a lease, he is estopped from denying the patentee's right, and must pay royalty."\*

*In the matter of D. H. R. Moses*, I. L. R. 15 Cal. 244, Petheram C. J. after quoting the observations of Lord Cairns, in *Clerk v. Adie*, L. R. 2 Ap. Ca. 423, said: "These words of Lord Cairns are perfectly general as to the position of a licensee. He there states the law to be, that a person who occupies that position, and has undertaken to manufacture machines as being the subject of an invention which has been patented, and so to make a profit out of the patent, must be taken as having admitted the validity of the patent, and as being a person, who cannot, as between himself and the patentee, dispute the validity or novelty of the invention, or any other circumstances which go to make a valid patent. Therefore, it seems to us that this case establishes the position—and that is what we should have expected it to do, because it does not seem there could be any doubt what the law would be—that a person, who

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\* *Vide* remarks of Lord Blackburn in *Clark v. Adie*, L. R. 2 Ap. Ca. 423.

occupies that position and makes a profit out of the patent, cannot afterwards, as between himself and the patentee, say that this thing is invalid as against the world."

As to Trademarks *vide* *Levergne v. Hooper*, I. L. R. 8 Mad. 149.

## CHAPTER IX.

### OF WITNESSES.

118. All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

*Explanation.*—A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

**Grounds of Incompetency.**—Mr. Best says: "The only grounds on which the evidence of a witness can, with any appearance of reason, be rejected *unheard* are reducible to four: 1st—That he has not that degree of intellect which would enable him to give a rational account of the matters in question; 2nd—That he cannot or will not guarantee the truth of his statements by the sanction of an oath or what the law deems its equivalent; 3rd—That he has been guilty of some crime or misconduct, showing him to be a person on whose veracity reliance would most probably be misplaced; 4th—That he has a personal interest in the success or defeat of one of the litigant parties. In a word, his rejection should be based on the reasonable apprehension, arising from known circumstances, that his evidence may mislead the tribunal and so cause misdecision."\* Under the Indian Evidence Act, in order to determine the question of competency, the only question for the Judge is whether the witness can understand the questions and give rational answers. The other grounds mentioned by Best may be considered in weighing the

\* Best on Evl., 8th Ed., 124.

value of the evidence. In *Queen-Empress v. Lal Sakai*, I. L. R. 11 All. 183, Straight J. observed : "The competency of such a person to be a witness is a matter for the Court to decide as a condition precedent to his being either sworn or affirmed ; the credibility to be attached to his statements is another matter altogether, and that question only arises when he has been sworn or affirmed, and has given his evidence as a witness. As to the competency of witnesses, that is specifically and in terms declared by sec. 118 of the Evidence Act, and I find in that section no direction or intimation to a Court which has to deal with the question whether a person should or should not be examined, that it is to enter upon inquiries as to his religious belief or open up such a field of speculation as is involved in the query, 'what will be the consequences here or hereafter if you will not tell the truth?' What I take the law to say is, and a very sound and sensible law I hold it to be, that a Court is to ascertain in the best way it can, whether, from the amount of intellectual capacity and understanding of a young or old person, that person is able to give a rational and intelligent account of what he has seen or heard, or done on a particular occasion ; and if the Court is satisfied that a child of twelve years or an old man or woman of very advanced age can satisfy those requirements, the competency of the witness is established."\* In the English law, three of the four grounds of incompetency still exist, namely ; 1st—Incompetency from want of reason and understanding ; 2nd—Incompetency from want of religion ; 3rd—Incompetency from interest.

**Incompetency from want of reason and understanding.**—The causes of this incompetency are twofold—*deficiency* of intellect and *immaturity* of intellect. Sir E. Coke says : "*Non compos mentis* (a man of 'non-sane memory') is of four sorts : 1st—An idiot, who, from his nativity, by a perpetual infirmity, is *non compos mentis* ; 2nd—He, that by sickness, grief or other accident, wholly loses his memory and understanding ; 3rd—A lunatic that hath sometime his understanding and sometime not (*vide* explanation to this section) ; Lastly, he, that by his own vicious act for a time, depriveth himself of his memory and understanding, as he that is drunken."

**Explanation.**—The explanation to the section seems to include the following cases : 1st—A lunatic, while in a lucid interval, is a competent witness ; 2nd—A monomaniac is a competent witness on matters not connected with his delusion. It follows that one suffering from mental disease or delusion is incompetent, if, in the opinion of the Judge, the disease or delusion is such as seriously to affect

\* *Vide also Queen-Empress v. Shava*, I. L. R. 16 Bom. 359.

the evidence of the witness on the points relevant to the issue which such evidence covers, and the ground of incompetency is restricted to cases where it is found impossible to communicate with the witness, so as to make him understand that he is in a Court of Justice and expected to speak the truth. Any eccentricities or aberrations which fall short of this are surely only matters of comment to the jury as to the reliance to be placed on his testimony.

**Persons of tender years.**—Under this section a child is competent to testify if it can understand the question put to it, and give rational answers thereto. In England, a child, to be a competent witness, must believe in punishment in a future state for lying. There is no precise or fixed rule as to the time within which infants are excluded from giving evidence. Children of the same age differ so immensely in their powers of observation and memory that no fixed rule can be laid down. The admissibility of their evidence depends upon their capacity to give an intelligible account of what they have seen or heard, which is to be collected from their answers to questions propounded to them by the Court. Even a child under seven can be examined as a witness if he shows sufficient capacity on examination. As regards the effect of the evidence of children when received, it is a question, exclusively for the Judge and the jury, to decide whether a conviction should be based upon such evidence alone and unsupported, and this question is to be determined on a review of all the circumstances of the case, and especially of the manner in which the evidence of the child has been given. In the case of witnesses of tender age, there is the absence of any motive to deceive, but some children indulge in habits of romancing, which often lead them to state as facts circumstances having no existence, but in their own imaginations, and the like consequence is not unfrequently induced in other children by the suggestions or threats of grown-up persons, acting on their fears and unformed judgments. The perception of a child is untrained. "It is easily beguiled, biased, influenced or intimidated."

**Persons of tender years.—Omission to administer oath or affirmation.**—At a trial on a charge of murder, one of the witnesses for the prosecution was a girl, about ten years old. The Sessions Judge allowed her to be examined without administering any oath or affirmation, as it was found that she did not understand the nature of either. The prisoner's counsel objected to the admissibility of her statements, but the objection was overruled, and the prisoner was convicted of murder and sentenced to death. *Held*, that the girl's evidence was admissible. An inability from tender

years to comprehend either the spiritual or legal obligations of an oath or solemn affirmation is not tantamount to intellectual incapacity, and should not make the child incompetent to be examined as a witness. The ignorance of a child on such a matter is not necessarily equivalent to an inability to understand ordinary questions and give rational answers—*Queen-Empress v. Shava*, I. L. R. 16 Bom. 359. (*Queen-Empress v. Shewa Bhogta*, 23 W. R. (F. B.) Cr. 12, approved. *Queen-Empress v. Maru*, I. L. R. 10 All. 207, and *Queen-Empress v. Lal Sakai*, I. L. R. 11 All. 183, dissented from).

**Accused Persons as Witnesses.**—(a). A charge of theft having been laid against A and B, process was issued against A only, and upon his being put upon his trial, B, who had not been arrested, was produced as a witness for the defence. *Held*, that his evidence was admissible—*Moresh Chunder Kopali v. Mohes Chunder Dass*, 10 C. L. R. 553.

(b). There is no law or principle which prevents a person who has been suspected and charged with an offence, but discharged by the Magistrate for want of evidence, being afterwards admitted as a witness for the prosecution—*Queen v. Behary Lall Bose*, 7 W. R. Cr. 44.

(c). Where there is no community of interest (*e.g.*, where the prisoners cited as witnesses for the defence are in precisely the same category as the accused person citing them is, and have a direct interest in procuring his discharge, whilst as the crime charged against all the prisoners could only have been effected by the guilty concurrence of five or more individuals, and the acquittal of the person citing such witnesses would lead directly to the acquittal of the witness prisoners themselves), any one of a number of persons jointly indicted may be called as a witness either for or against his co-defendants—*Queen v. Ashruff Sheikh*, 6 W. R. 91.

(d). A person never arrested, and against whom no process has issued, is a competent witness, even if a principal offender.—*Tinkler's case*, 1 East P. C. 354.

(e). In England, it has been questioned whether a prisoner, under sentence of death, is a competent witness—*R. v. Webbe*, 11 Coxe 133.

(f). Where a Magistrate had issued a warrant against two persons for theft and they were brought before him, and the Magistrate tendered them a pardon, such tender being illegal, and took their evidence as witnesses, and they gave evidence also at the Sessions trial, it was held that being accused persons, and not having been legally pardoned, they could not be examined as witnesses until they had been



acquitted, or discharged, or convicted. Their evidence was rejected as absolutely inadmissible—*Reg. v. Hanumanta*, I. L. R. 1 Bom. 610. *Vide* (1) *Empress v. Ashghar Ali*, I. L. R. 2 All. 260; (2) *Queen-Empress v. Dala*, I. L. R. 10 Bom. 190. *Vide also Empress v. Karim Buksh*, I. L. R. 2 All. 386.

(g). During the course of Police investigation into a case of house-breaking and theft, several persons were arrested, one of them, named Hari, made certain disclosures to the Police, and pointed out several houses which had been broken into by his accomplices. Thereupon, the Police discharged him, and made him a witness. At the trial he gave evidence against his accomplices, who were all convicted. *Held*, that the evidence of Hari was admissible under this section, though he had been illegally discharged by the Police, as he was not an accused person, *i.e.*, a person over whom the Magistrate or other Court is exercising jurisdiction—*Queen-Empress v. Mona Puna*, I. L. R. 16 Bom. 661. (The case of *Reg. v. Hanumanta* was distinguished).

**As to competency in Criminal Cases.**—*Vide* Art. 108, Steph. Dig.

**Attendance of Witnesses.**—*Vide* Civil Procedure Code, Chapter XIV, and Criminal Procedure Code, Chapter XVIII.

119. A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence.

Deaf and dumb persons were formerly excluded as witnesses on the presumption of their idiocy. Now, if it can be shown that a person deaf and dumb can be communicated with either by signs and tokens or by writing, and it appears that he is possessed of intelligence, he may be examined as a witness.

120. In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or

Parties to civil suit, and their wives or husbands. Husband or wife of person under criminal trial.

wife of such person, respectively, shall be a competent witness.

**Law of England as to competence of Parties and of Husband or Wife of a Party.**—Formerly the common law of England excluded the evidence of parties to a proceeding and of the husband or wife of a party. This rule, which applied equally to civil and to criminal proceedings, was founded solely on the interest which the parties to the suit were supposed to have in the event of it. Persons interested and persons who had been convicted of certain crimes were also incompetent witnesses, but their incompetency was removed by 6 and 7 Vic. C. 85. Sec. 2 of 14 and 15 Vic. C. 99 removed the incompetency as to parties in civil cases; but sec. 3 provided that “nothing herein contained shall render any person who, in any criminal proceeding, is charged with the commission of any indictable offence or any offence punishable on summary conviction competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, &c.” The 4th section provided that nothing in the Act should apply to any proceeding instituted in consequence of adultery, or to any action for breach of promise of marriage. 16 and 17 Vic. C. 83 made a further improvement in the law. By secs. 1 and 2, the incompetency as to husbands and wives was removed, except in proceedings for adultery. This exception was repealed by 32 and 33 Vic. C. 68, secs. 2 and 3 with the proviso that no witness, whether a party to the suit or not, is liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless he or she has already, in the same proceeding, given evidence in disproof of adultery. This provision applied to proceedings instituted in the Court of Divorce and Matrimonial causes.

**Bastardy Proceedings.**—(a). Bastardy proceedings, under the provisions of sec. 488 of the Criminal Procedure Code, are in the nature of civil proceedings, and the person sought to be charged is a competent witness on his own behalf—*Nurmahomed v. Bismolla Jan*, I. L. R. 16 Cal. 731. *Vide also In re Toki Bibi v. Abdulkhan*, I. L. R. 5 Cal. 536.

(b). A married woman, in a proceeding under sec. 488 of the Criminal Procedure Code, can be examined as to non-access of her husband during her married life, without independent evidence being first offered to prove the illegitimacy of her children, as such proceeding is of a civil nature—*Rozario v. Inglis*, I. L. R. 18 Bom. 468.

**Proceedings under the Indian Divorce Act.**—(a). Act IV of 1869 restricts the competency of husbands and wives to suits in which the parties offer themselves as witnesses or verify their cases by affidavit and to suits by wives praying for dissolution of marriage on the ground of adultery coupled with cruelty, or coupled with desertion without reasonable cause. A general rule of competence is laid down by the present section without any express reference to matrimonial proceedings. But it seems that the rule as to the parties to matrimonial cases being competent and compellable to give evidence is more restricted here than in England. *Vide* sections 51 and 52 of Act IV of 1869.

(b). In the case of *De Bretton v. De Bretton*, I. L. R. 4 All. 49, A was made co-respondent on the application of the respondent's counsel. A was afterwards examined under subpoena as a witness for the petitioner, who asked for the dissolution of his marriage on the ground of adultery. A was sworn without objection, and was asked whether he had had sexual intercourse with the respondent. The Court in reply to his inquiry told him that he was bound to answer this question, and he answered it in the affirmative. He would not have answered it, if he had been aware that he might have declined. Subsequently, at the final hearing it was contended that inasmuch as he had not offered himself as a witness under sec. 51 of Act IV of 1869, his evidence was not receivable. It was held that he had not "offered" to give evidence within the meaning of sec. 51, and that his answer to the particular question was not admissible. The special provisions contained in secs. 51 and 52 of the Divorce Act could not be treated as having been practically repealed by the provision of this section, and that of sec. 132 of the Act.

**Criminal Proceedings.**—The rule as to the competence of husband and wife as a witness in criminal cases is a re-enactment of the law in force in this country as laid down by Sir B. Peacock in *Queen v. Kharrulla*, 6 W. R. (F. B.) Cr. 21. The Chief Justice said: "Two questions have been referred in this case: 1st—Whether, upon a trial in the mufasil of a person charged with an offence, his wife is competent to give evidence for or against him? 2nd—Whether, upon a trial in the mufasil of several persons charged jointly with an offence, the wife of one of them is competent to give evidence for or against the others? I am of opinion that both of these questions must be answered in the affirmative. It is a general rule of English law, subject to certain exceptions, that in criminal cases, a husband and wife are not competent to give evidence for or against each other. But the English law is not the law of the mufasil.... It

is clear that the English criminal law was not the criminal law of the mufassil, and that the English Law of Evidence was never extended by any regulation of Government to criminal trials there."

121. No Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any questions as to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrate; but he may be examined as to other matters which occurred in his presence whilst he was so acting.

### *Illustrations.*

(a). A, on his trial before the Court of Session, says that a deposition was improperly taken by B, the Magistrate. B cannot be compelled to answer questions as to this, except upon the special order of a superior Court.

(b). A is accused before the Court of Session of having given false evidence before B, a Magistrate. B cannot be asked what A said, except upon the special order of the superior Court.

(c). A is accused before the Court of Session of attempting to murder a Police-officer whilst on his trial before B, a Sessions Judge. B may be examined as to what occurred.

**Extent of the Privilege.**—The privilege given by this section is the privilege of the witness, i.e., of the Judge or Magistrate of whom the question is asked. If he waives such privilege or does not object to answer the question, it does not lie in the mouth of any other person to assert the privilege.\* It extends only to his own conduct in court as such Judge or Magistrate, or to anything which came to his knowledge in court as such Judge or Magistrate; and though he may be examined as to other matters which occurred in his presence whilst he was so acting, yet, as a rule, it would not be quite right or politic to examine him except under very peculiar circumstances. Where it becomes necessary for a Judge to give evidence, the proper course, says Mr. Taylor, "appears to be that he

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\* *Fule Empress v. Chidda Khan*, I. L. R. 3 ALL. (F. B.) 573.

should leave the Bench and take no further judicial part in the trial, because he can hardly be deemed capable of impartially deciding on the admissibility of his own testimony, or of weighing it against that of another."

**Judge as a Witness.**—(a). In the case of *Queen v. Bholanath Sen*, I. L. R. 2 Cal. 23, Macpherson and Morris JJ. remarked as follows : "Without saying that it is illegal for a Magistrate to give evidence in the witness-box in a case with which he is dealing judicially, it clearly is, on general principles, most undesirable that a Judge should be examined as a witness in a case which he himself is trying, if such a contingency can possibly be avoided." (*The case of Queen v. Hiralal Das*, 8 B. L. R. 422, was referred to).

(b). In the case of *Empress v. Donnelly*, I. L. R. 2 Cal. 405, Markby J., after reviewing the cases of *Queen v. Mukta Sing*, 13 W. R. Cr. 60, and *Queen v. Tarapersaud Bhattacharji*, N. A. Rep. 1857, Pt. II, p. 83, said : "In the absence, therefore, of any authority for the position that a sole Judge of law and fact may give evidence, and then decide a case in which he has been witness, I refuse to give any countenance to what appears to me to be a most objectionable proceeding. Everyone admits that it is highly objectionable for a Judge to give evidence even when there are other Judges besides himself. For my own part, I consider these objections so formidable that I would gladly see the practice of calling a Judge as a witness abolished in all cases. But these objections are greatly increased when the Judge who testifies is a sole Judge. The case is entirely in his hands. He has no one to restrain, correct, or check him. If he gives evidence upon any matter of importance, the party against whom his evidence tells could not venture to test his credibility either by cross-examination, or contradict it by other testimony. I need say nothing of the indecency of such a proceeding ; no one dare venture to defend it. The Judge would, therefore, give his evidence without the usual safeguards against false testimony—a position which has been over and over again repudiated . . . I am, therefore, of opinion that a Judge who is a sole Judge of law and fact cannot give his own evidence, and then proceed to a decision of the case in which that evidence is given. Mr. Prinsep J. said, "that I consider that the authorities quoted in the judgment of Mr. Justice Norman in *Queen v. Mukha Singh* are conclusive, that one who is sitting as a sole Judge is not competent also to be a witness. No case has been quoted in which this has ever occurred, and the inexpediency of such a rule as well as its possible evil results are too obvious to call for explanation."

(c). A person having to exercise judicial functions may give evidence in a case pending before him, when such evidence can and must be submitted to the independent judgment of other persons, exercising similar judicial functions sitting with him at the same time. A Sessions Judge is a competent witness, and the giving of evidence by him does not preclude him from dealing judicially with the evidence of which his own forms a part—*Queen v. Mukta Singh*, 13 W. R. Cr. 60. This case was decided upon the authority of English cases.

**Importing knowledge in the Judgment without giving Evidence.**—(a). A Judge cannot give evidence in a case merely by making a statement of fact in his judgment. If he intends the Courts to act upon his statement, he is bound to make that statement in the same manner as any other witness—*Mrs. Rosseau v. Mrs. Pinto*, 7 W. R. 190. *Vide also Kishor Singh v. Ganesh Mukerji*, 9 W. R. 252.

(b). A Judge cannot, without giving evidence as a witness, import into a case his own knowledge of particular facts, as his means of knowledge will not then be capable of being tested—*Hurpershad v. Sheo Doyal*, 3 Cowell's I. A. 259.

**Arbitrator.**—An arbitrator may be called as a witness in an action to enforce his award, and may be asked what passed before him, and what matters were presented to him for consideration, but not what passed in his own mind when exercising his discretionary powers as to the matters submitted to him—*Duke of Buccleuch v. Metropolitan Board of Works*, L. R. 5 H. L. 418.

It seems that an arbitrator would not come within the rule laid down by this section.

**Assessor.**—In the case of *Swamirao v. The Collector of Dharwar*, I. L. R. 17 Bom. 299, it was held that a person who is appointed an assessor under sec. 19 of the Land Acquisition Act (X of 1870) performs *quasi*-judicial functions, and is, therefore, incompetent to testify as a witness in the same proceedings. Jardine J. said: "Having regard to the legal effect of an assessor's opinion, we think the views expressed in *Empress v. Donnelly*, I. L. R. 2 Cal. 405, on the course to be adopted when a sole Judge has testified as a witness, ought to influence this Court in its disposal of the present case, if there were any doubt."

122. No person who is or has been married, shall be compelled to disclose any communication made to him during  
 Communications during marriage.

marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.

**Extent of the Rule.**—The protection is not confined to cases where the communication sought to be given in evidence is of a *strictly confidential* character, but the seal of the law is placed upon *all communications of whatever nature* which pass between husband and wife. It extends also to cases in which the interests of strangers are solely involved, as well as to those in which the husband or wife is a party on the record. No witness need disclose a communication made to him or her by wife or husband during marriage, nor, without the permission of the wife or husband, *can* a witness disclose any such communication except in the two classes of cases specified. The privilege extends to communications made during marriage, although the marriage has been dissolved; but not to communications made before marriage, although the marriage is still existing when the evidence is tendered. The exception in the case of a prosecution of one married person for an offence against the other is grounded on the common law English rule, which, in such cases, always made the husband or wife a competent witness.\*

123. No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

**Affairs of State.**—Affairs of State include any matter of a public nature with which the Government is concerned.

The laws of every country suppress much evidence that would be relevant or even conclusive, where its reception would involve the

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\* *Vide* Taylor, secs. 909, 910 and 1871.

disclosure of matters of permanent importance, which public policy and social order require to be concealed, such as secrets of State, communications made in professional confidence, and others.—Best, 8th Ed., 34, 35.

It is not the Judge, but the public officer concerned, who is to decide whether the evidence referred to in this section or section 124 shall be given or withheld. (Refer to sec. 162 *post*).

124. No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interest would suffer by the disclosure.

Official communications.

**Statement by an Officer before a Military Court of Inquiry.**—Statements, whether oral or written, made by an officer summoned to attend before a Military Court of Inquiry, are part of the minutes of the proceedings of the Court, which, when reported and delivered to the Commander-in-Chief, are received and held by him on behalf of the Sovereign, and on grounds of public policy, cannot be produced in evidence—*Dawkins v. Lord Rokeby*, L. R. 8 Q. B. 255.

125. No Magistrate or Police-officer shall be compelled to say whence he got any information as to the commission of any offence, and no revenue-officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue.

Information as to commission of offences.

**Explanation.**—‘Revenue-officer’ in this section means any officer employed in or about the business of any branch of the public revenue.

It is perfectly right that all opportunities should be afforded to discuss the truth of the evidence given against a prisoner; but there is a rule which has universally obtained, on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which the detection is made should not be unnecessarily disclosed. *Vide* remarks of Eyre C. J. in Hardy’s case, 24 Howell’s State Trials, 808.



126. No barrister, attorney, pleader or vakil, shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment. Provided that nothing in this section shall protect from disclosure—

(1) Any such communication made in furtherance of any illegal purpose ;

(2) Any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, pleader, attorney or vakil was or was not directed to such fact by or on behalf of his client.

*Explanation.*—The obligation stated in this section continues after the employment has ceased.

#### *Illustrations.*

(a). A, a client, says to B, an attorney—‘I have committed forgery, and I wish you to defend me. As the defence of a man known to be guilty is not a criminal purpose, this communication is protected from disclosure.’

(b). A, a client, says to B, an attorney—‘I wish to obtain possession of property by the use of a forged deed on which I request you to sue. This communication, being made in furtherance of a criminal purpose, is not protected from disclosure.’

(c). A, being charged with embezzlement, retains B, an attorney, to defend him. In the course of the proceedings, B observes that an entry has been made in A’s account-book, charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment. This being a fact observed by B in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

**Difference between our Law and the Law of England.**—The law relating to professional communications between a solicitor and a client is the same in India as in England, with one exception only. The one exception relates to the substitution of ‘illegal purpose’ for ‘criminal purpose’ in the first portion of the proviso to this section. Under the present Act, it is clear that the legal adviser may be asked whether the communication between him and his client was for an illegal purpose or not. (*Vide* sections 132 and 165 *post*). In England, it appears that it must be shewn by independent evidence that there was a criminal intention. (*Vide* Taylor, sec. 912).

**Reason of the Rule.**—If professional communications were not protected, no man would dare to consult a professional adviser with a view to his defence or to the enforcement of his rights; and no man could safely come into a Court, either to obtain redress or to defend himself. The exclusion of such evidence is for the general interest of the community, and therefore to say that, when a party refuses to permit professional confidence to be broken, everything must be taken most strongly against him, what is it but to deny him the protection, which, for public purposes, the law affords him, and utterly to take away a privilege, which can thus only be asserted to his prejudice.\* This privilege owes its origin and maintenance to an obvious public policy. The rule is well established, and is stated at length in *Greenough v. Gaskell*, 1 M. and K. 98, and *R. v. Cox and Railton*, L. R. 14 Q. B. D. 153.

**Scope of the Section.**—(a). The wording of this section seems to include communications made by agents or servants of parties. In

\* *Vide* remarks of Lord Brougham in the case of *Bolton v. The Corporation of Liverpool*, 1 My. and K. 94.

the case of agents or servants, the English law draws a distinction between reports made in the course and as part of the duty of an agent or servant, and those made confidentially and for the purpose of litigation alone.

(b). "It is to be noted that neither this section nor sec. 131 has the effect of *prohibiting* a barrister or other professional person from producing a document entrusted to his charge by a client, though sec. 131 justifies his refusal to do so. The production of such a document would, however, be so wholly at variance with the spirit of secs. 126, 130 and 131, that it would, probably, not be allowed by the Court unless with the client's consent."—Cung. Ev., 334.

**Nature of the Communication and Extent of the Privilege.—**

(a). The communication, in order to be privileged, must have been in the course and for the purpose of the legal adviser's employment. It is not, however, necessary that there should have been any regular retainer, or any particular form of application or engagement, or the payment of any fees; it is enough if the legal adviser be in any way consulted in his professional character.\* It is quite immaterial whether the communication be made with reference to any pending or contemplated litigation. If it be with reference to the matters which fall within the ordinary scope of professional employment, the legal adviser cannot disclose it.† It is not every communication made by a client to an attorney that is privileged from disclosure. The privilege extends only to communications made to him confidentially, and with a view to obtaining professional advice. The use of the word 'disclose' shows that the communication to be privileged must be of a confidential or private nature between solicitor and his client.‡ The proviso (1) prohibits the extending of the protection to communications made in furtherance of any illegal purpose, as it is no part of the professional business of any class of lawyer to further the commission of a fraud. In *Follett v. Jefferyes*, 1 Sim. Chan. Rep. N. S. 17, Rolfe V. C. observed: "It is not accurate to speak of cases of fraud, contrived by the client and solicitor together, as cases of exception to the rule. They are cases not coming within the rule itself, for the rule does not apply to *all which passes* between a client and his solicitor, but only to what passes between them in professional confidence; and no Court can permit it to be said that the contriving of a fraud can form part of the professional occupation of an attorney or solicitor." In *Russell v. Jackson*, 9 Hare's Chan. Rep. 392, Turner V. C. said: "I am very

\* *Vide Taylor*, sec. 923.

† *Vide Taylor*, sec. 913.

‡ *Vide Framji Bhicaji v. Mohan Sing, Dhan Sing*, I. L. R. 18 Bom. 263.

much disposed to think that the existence of an *illegal purpose* would prevent any privilege attaching to the communications. Where a solicitor is party to a fraud, no privilege attaches to the communications with him upon the subject, because the contriving of a fraud is no part of his duty as solicitor; and I think it can as little be said that it is part of the duty of a solicitor to advise his client as to the means of evading the law."

(b). It should be clear that the particular communications sought to be protected were made by the party to the solicitor as his own solicitor. If the party employs an attorney who is also employed on the other side, the privilege is confined to such communications as are clearly made to him in the character of his own attorney. *Vide Perry v. Smith*, 9 M. and W. 681.

(c). A solicitor is not at liberty, without his client's express consent, to disclose the nature of his professional employment. The section protects from publicity, not merely the details of the business, but also its general purport, unless it be known *aliunde* that such business falls within proviso (1) or (2) to the section—*Framji Bhicaji v. Mohan Sing, Dhan Sing*, I. L. R. 18 Bom. 263.

(d). The existence, nature, and scope of a professional communication are absolutely privileged from investigation.—Best, 8th Ed., 540.

(e). Communications between a client and legal adviser acting in his professional capacity are absolutely and perpetually privileged in all suits whatever, whether the client be a party thereto or not.—Greenl. Ev., sec. 236.

(f). Where, in an affidavit of documents, privilege is claimed for a correspondence on the ground that it contains instructions and confidential communications from the client (the plaintiff) to his solicitor, it must appear not merely that the correspondence generally contains instructions, &c., but that each letter contains instructions or confidential communications to the attorney with reference to the conduct of the suit—*The Oriental Bank Corporation v. T. F. Brown & Co.*, I. L. R. 12 Cal. 265.

**Communications which have been held to be Privileged.**—(a). Statements laid by clients before counsel for the purpose of obtaining legal advice are privileged—*Munchershaw Bezoni v. The New Dhurumsey Spinning and Weaving Company*, I. L. R. 4 Bom. 576.

(b). The plaintiffs resided in England, and sued the defendant in Bombay, for specific performance of an agreement to purchase certain premises. This agreement had been made on behalf of

the plaintiffs by S., their agent in Bombay. The defendant pleaded that by the terms of the agreement it was provided that the deed of assignment should contain a covenant by the three plaintiffs to indemnify the defendant against any claims upon the premises that might be made at any time by or on behalf of the representatives of one N. The defendant's solicitor prepared a draft assignment which contained this covenant, and sent it to the plaintiffs' solicitors, Messrs. Prescott and Winter, for approval. On the 19th March 1880, Mr. Winter called upon Mr. Payne, the defendant's solicitor, and informed him that M., the third plaintiff, refused to sign any deed which contained the above covenant. At this interview, Mr. Winter read to Mr. Payne portions of a letter written with reference to the proposed deed by McG. & Co. (solicitors of the first two plaintiffs) to V., the solicitor of the third plaintiff, and of another letter written by V. to his client, the third plaintiff. The defendant called upon the plaintiffs to produce these letters for inspection. *Held*, that the letters were privileged, and that the fact that portions of them had been read to the defendant's solicitor, was no waiver of the privilege as regarded the parts which were not read—*Kay and two others v. Poorun Chund Poonalal Javherry*, L. L. R. 4 Bom. 631.

(c). A plaintiff, at the instance of his solicitors, sent a gentleman to India for the purpose of acting as the solicitors' agent in the collection of evidence, respecting a pending suit. Letters written by the agent either to the plaintiff or to the solicitor were protected—(1) *Steele v. Stewart*, 1 Phill. 471 ; (2) *Hamilton v. Nott*, L. R. 16 Eq. Cr. 112.

(d). Belief founded on privileged communications is equally privileged—*Lyell v. Kennedy*, 9 Ap. Ca. 81.

**Communications which are not privileged.**—(a). It may be laid down generally in the language of Lord Cranworth, "that there is no protection as to letters between parties themselves or from a stranger to a party, merely because such letters may have been written in order to enable the person, to whom they were addressed, to communicate them in professional confidence to his solicitor."—Taylor, sec. 921.

(b). "If an attorney, by the direction of his client, makes a proposal to the opposite party, he may be compelled to disclose what he stated to that party, though he cannot divulge what his client had communicated to him."—Taylor, sec. 932.

(c). An attorney can be compelled to say whether a document, which he may have obtained from his client in the course of

communication with reference to the cause, is in his possession, or elsewhere in Court. He may also be compelled to discover to whom he parted with his client's title-deeds, and in whose possession they are.

(d). Where communications are made to an attorney in the presence of the other party, such communications cannot be treated as privileged—*Memon Haji Haroon v. Moulavi Abdul Karim*, I. L. R. 3 Bom. 91.

(e). Where communications were made to a lawyer, but from some accidental cause he was not employed, such communications are not privileged.

(f). Communications made to a professional person previous to his employment are not privileged, nor are communications made to a man under an erroneous notion that he is an attorney, privileged.

(g). Where a solicitor claims privilege under this section, he is bound to disclose the name of his client, on whose behalf he claims the privilege—*Framji Bhicaji's case*, I. L. R. 18 Bom. 263.

(h). At an interview between a solicitor and a client, the solicitor took down a certain statement made by a person named A. B., who was in his client's company, and whose name was communicated to him in the course, and for the purpose of his professional employment. A. B. was afterwards tried for defamation, and the solicitor was examined by the prosecution with reference to the statement made to him by the accused at the above interview. The solicitor was asked whether the person, who had made the statement, had given his name as A. B. The solicitor declined to answer the question on the ground of privilege. *Held*, that the solicitor was bound to answer the question, unless A. B.'s name was communicated to him by his client in confidence with a view to its not being disclosed—*Framji Bhicaji v. Mohan Sing, Dhan Sing*, I. L. R. 18 Bom. 263.

(i). Letters written by one of the defendant's servants to another for the purpose of obtaining information, with a view to possible future litigation, are not privileged, even though they might, under the circumstances, be required for the use of the defendant's solicitor. In order that privilege may be claimed, it must be shewn on the face of the affidavit that the documents were prepared or written merely for the use of the solicitor—*Bippro Dass Dey v. The Secretary of State for India in Council*, I. L. R. 11 Cal. 655.

(j). The privilege does not extend to matters of fact which the attorney knows by any other means than confidential communication

with his client, though, if he had not been employed as attorney, he probably would not have known them.—Best, 8th Ed., 531.

(k). The word 'illegal' would not include the sin of adultery according to English law—*Branford v. Branford*, L. R. 4 P. D. 72.

**No hostile inference arises from a refusal to allow confidential communications to be disclosed.**—*Vide* remarks of Lord Brougham in *Bolton v. The Corporation of Liverpool*, 1 My. and K., quoted above. *Vide* also *Wentworth v. Lloyd*, 10 Jur. N. S. 961.

**When the protection ceases.**—The protection does not cease with the termination of the suit or business in which the communication was made, nor yet with the death of the client. The privilege is that of the client. The seal of the law remains for ever, unless removed either by the party himself or perhaps by the personal representatives after his death. The removal may be effected by the express waiver of the client or by his calling the barrister, pleader, attorney or vakil as a witness, and questioning him on matters which, but for such question, he would not be at liberty to disclose. The fact of his giving evidence in the suit of his own accord does not deprive him of this privilege, nor is he deprived of it by being compelled to give evidence at the instance of another party.

127. The provisions of section one hundred and twenty-six shall apply to interpreters, and the clerks or servants of barristers, pleaders, attorneys, and vakils.

Section 126 to apply to interpreters, &c.

“Under the present section, the test would be whether the person in question was the clerk or servant of a barrister, pleader, attorney or vakil, or the clerk or servant of the party; in the latter case, the section would not extend to him.”—Cung. Ev., 335. *Vide* notes to section 126 ante.

128. If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section one hundred and twenty-six; and if any party to a suit or proceeding calls any such barrister, pleader, attorney or vakil as a

Privilege not waived by volunteering evidence.

witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, pleader, attorney or vakil on matters which, but for such question, he would not be at liberty to disclose.

By the old law, a party who gave evidence at his own instance, was deemed to have waived his privilege not to disclose any professional communication.

**Waiver of Privilege.**—The client does not waive his privilege by calling the solicitor as a witness, unless he also examines him in-chief to the matter privileged; and even in that case, it has been held in Ireland that the cross-examination must be confined to the point upon which the witness has been examined in-chief.—Taylor, secs. 849 and 927.

129. No one shall be compelled to disclose to the Court any confidential communications which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others.

**Reason of the Rule.**—The principle contended for in sections 846 and 847 of Taylor's Evidence has been adopted in this section, with this qualification that if a party becomes a witness of his own accord, he shall, if the Court requires it, be made to disclose everything necessary to the true comprehension of his testimony, and shall be bound to produce such confidential writing or correspondence as would be necessary for the said purpose. The principle of protection herein advocated is founded on the exigencies of human affairs. To enable a counsel or solicitor to nip litigation in the bud by timely warning or suggestion, an exact knowledge of the facts is necessary; but if professional communications be embarrassed by any fear of disclosure, advice would have to be given on maimed and distorted statements. The rule of protection should, therefore, be construed in a sense most favourable to bringing professional knowledge to bear effectively on the facts, out of which legal rights



and obligations arise, and disclosures should not be enforced in any case except where they are plainly necessary.\*

**Compelled to disclose.**—"In section 129, 'compelled' cannot mean 'subpœnaed,' and it uses the words 'compelled to disclose' with reference to the case when a man has offered himself as a witness, and must refer to some force put upon the witness after he is in the witness-box"—*Moher Sheikh v. Queen-Empress*, I. L. R. 21 Cal. 392.

**Instances.**—1. Documents which contain the purport of interviews with, and of advice received from, the plaintiffs' solicitors and counsel as to the plaintiffs' position in regard to their said claim and as to the steps to be taken thereto are privileged—*W. D. Ryrie v. Shiva Sankar Gopalji*, I. L. R. 15 Bom. 7.

2. Documents which record the steps taken by the plaintiffs from time to time in prosecuting their claim against the defendant are not privileged—*W. D. Ryrie v. Shiva Sankar Gopalji*, I. L. R. 15 Bom. 7.

3. Opinions upon, or steps taken in, reference to a suit in which plaintiffs and defendant are putting forward opposing contentions, cannot be said to relate solely to the case of the plaintiff, and are privileged—*W. D. Ryrie v. Shiva Shankar Gopalji*, I. L. R. 15 Bom. 7.

**Confidential communications made by Agents or Servants of parties for the purpose of litigation.**—(a). "Any report or communication by an agent or servant to his master or principal, which is made for the purpose of assisting him to establish his claim or defence in an existing litigation, is privileged, and will not be ordered to be produced; but, if the report or communication is made in the ordinary course of the duty of the agent or servant, whether before or after the commencement of the litigation, it is not privileged, and must be produced. The time at which the communication is made is not the material matter, nor whether it is confidential, nor whether it contains facts or opinions. The question is whether it is made in the ordinary course of the duty of the servant or agent, or for the instruction of the master or principal as to whether he should maintain or resist litigation"—*Woolley v. North London Ry. Co.*, L. R. 4 C. P. 602.

(b). "If a man writes a private letter to an agent or friend asking him to obtain information for him on a matter as to which he is about to engage, or has engaged, in litigation, I doubt whether a discovery or inspection of the answer to that letter would be ordered

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\* *Vide Munchershaw Bezonji v. The New Dhurumsey Spinning and Weaving Company*, I. L. R. 4 Bom. 578.

by any of the learned Judges in equity, to whose decisions reference has been made; and I will not be a party to establishing such a precedent." *Vide* remarks of Cockburn C. J., in *Chartered Bank of India v. Rich*, 32 L. J. (Q. B.) 300.

(c). The privilege which exempts a communication from production is the privilege of the client, and not of the solicitor, and communications relating to the subject-matter of the suit, and furnished with a view to litigation, are as much protected upon principle when made by a lay agent as they are when made by a solicitor—*Ross v. Gibbs*, L. R. 8 Eq. 522.

(d). The case of *Bustros v. White*, L. R. 1 Q. B. 423, decided by eight eminent Judges, terminated the conflict of decisions between the Divisions of the Supreme Court of Judicature in England. In that case it was held that correspondence between the plaintiff and his agent and another firm, which the defendant claimed to see as 'material to his defence' was not privileged, inasmuch as it did not come within the rule of privilege applying to professional confidence, which only applied to inquiries instituted by or under the direction of professional advisers. Jessel M. R. remarked: "There is nothing that brings the matter of opinion within the rule as to professional or quasi-professional privilege; and by quasi-professional privilege I understand this to be meant that the advice or communication may be protected when it does not proceed from the solicitor directly, but is information sent at his instance by an agent employed by him, or even by the client on his recommendation."

(e). The case of *Bustros v. White* has been followed in this country in the case of *Wallace v. Jefferson*, I. L. R. 2 Bom 453. In this case the defendant prayed for the production of two or three telegrams and letters, all of which had passed between the plaintiffs in London and Mr. Richardson, who managed their business in Bombay. It was said that they were protected, as they were confidential communications between principals and their agents. The Bombay High Court ordered their production, observing: "The mere circumstance that communications are confidential does not render them privileged as pointed out by the Master of the Rolls in *Anderson v. Bank of British Columbia* (L. R. 1 Q. B. D. 139). They must be, to use his words, confidential communications with a professional adviser, and this view of the law was confirmed by the Court of Appeal consisting of Lords Justices James and Mellish. Nor would it be possible, having regard to the position in which Mr. Richardson stood to the plaintiffs, to treat him as a deputy of the solicitors in Bombay, even if the plaintiffs, had at that time, been in communication with professional advisers; which does not appear on the affidavit to have been the

case. Lord Justice Mellish, in the case of *Anderson v. Bank of British Columbia*, suggests that the privilege may perhaps extend to cases in which an agent, as distinguished from a solicitor, is employed in communicating evidence to be used at the trial. But it is not suggested that the letters from Mr. Richardson were of that nature. The documents, as shown by Mr. Richardson's affidavit, are of the same nature as those of which production was ordered in *Anderson v. Bank of British Columbia*."

(f). In the case of *Bippro Das De v. Secretary of State for India*, I. L. R. 11 Cal. 655, it was said: "The letters of which production is sought were a letter by Major Thomas to Major Hallett, and Major Hallett's reply to it; the first being a letter written for the purpose of giving Major Hallett information with a view to possible future litigation. It does not appear that it, or the reply to it, was written for the purpose of being communicated to any solicitor. It is consistent with the terms of the affidavit that both letters were written without any such purpose; but that they were of such a nature, that they might, in the event of litigation, be communicated to the solicitor. This does not show enough to entitle the documents to protection. It is for the party claiming the privilege to show that the documents were prepared for the use of his solicitor; that they came into existence for the purpose of being communicated to the solicitor with the object of obtaining his advice or of enabling him to prosecute or defend an action, as Cotton J., at p. 322, or as Brett L. J., at p. 320, in the case of the *Southwork and Vauxhal Water Co. v. Quick*, L. R. 3 Q. B. D. 315, says, modifying the words of Mellish L. J., in *Anderson v. Bank of British Columbia* 'merely for the purpose of being laid before the solicitor for his advice or consideration' . . . Nor, would it, I think, be enough to protect these letters, if they were written with a view to possible future litigation and with the intention that in that case they should be laid before a solicitor."

130. No witness who is not a party to a suit shall be compelled to produce his title-deeds to any property, or any document in virtue of which he holds any property as pledgee or mortgagee, or any document the production of which might tend to criminate him, unless he has agreed in writing to produce them with the person seeking the

Production of  
title-deeds of  
witness not a  
party.

production of such deeds or some person through whom he claims.

**Purport of the Section.**—This section relates to the case in which the document is the witness's own title-deed. Its provisions correspond with the English law, which is more extensive than our law, inasmuch as it exempts a witness from producing a document which might subject him to penalty or forfeiture,\* which this section does not.

**Evidence of the contents of a Document which the Witness cannot be compelled to produce.**—The English law is that when a witness is not compellable to produce his title-deeds, he cannot be compelled to answer questions as to their contents. In *Davies v. Waters*, 9 M. and W. 606, Alderson B. observed: "It would be perfectly illusory for the law to say that a party is justified in not producing a deed, but that he is compellable to give parol evidence of its contents; that would give him, or rather to his client through him, merely an illusory protection if he happens to know the contents of the deed, and would be only a round-about way of getting from every man an opportunity of knowing the defects there may be in the deeds and titles of his estate." The same rule applies to our country.

**Extent of the Rule.**—(a). There is nothing to prevent a person being subpoenaed to produce title-deeds or other documents which he would be entitled to refuse to produce. It is for him to claim his privilege when asked in court to produce them. (*Vide* sec. 162 *post*).

(b). Upon principles of reason and equity, Judges will refuse to compel either a witness or a party to a cause to produce either his title-deeds, or any document which he holds as a mortgagee or pledgee. But a witness will not be allowed to resist a *subpoena duces tectum* on the ground of any lien he may have on the document called for as evidence, unless the party requiring the production be himself the person against whom the claim of lien is made.—Taylor, sec. 458.

(c). The document must be one, by the production of which the title of the party on whose behalf it is held might be capable of being affected.—Goodeve, 148.

(d). Where the deeds, instead of being required in the shape of collateral testimony on some foreign issue, are to be the subject of *impeachment* themselves, or to be connected with a fraud, the subject

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\* *Vide Whitaker v. Lord*, 2 Tau. 115.

of investigation, they would not fall within the protection.—Goodeve, 148.

(e). The fact that the production of a document will expose the person producing it to a civil action affords no ground for protection under this section.

131. No one shall be compelled to produce documents in his possession, which any other person would be entitled to refuse to produce if they were in his possession, unless such last-mentioned person consents to their production.

Production of documents which another person, having possession, could refuse to produce.

*Vide notes to sec. 130 ante.*

This section extends not only to professional men, but to trustees, mortgagees, and agents. The principle is in accordance with the English law.

132. A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind :

Witness not excused from answering on ground that answer will criminate.

Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.

Proviso.

**Scope of the Section.**—(a). This section does not in terms deal with all criminating questions which may be addressed to a witness, but only

with questions as to matters relevant to the matter in issue. Irrelevant questions should not be allowed, and it may be implied from the limitation in this section that a witness should be excused from answering questions tending to criminate as to matters which are irrelevant. To understand this section, it is desirable to consider it in connection with the subsequent secs. 146, 147 and 148, inasmuch as they together embrace the whole range of questions which can properly be addressed to a witness. By sec. 138, it is enacted that a witness must be examined and cross-examined as to relevant facts, and by sec. 146, it is enacted that, in cross-examination, he may also be asked any question which may tend to test his veracity, or to discover who he is and what is his position in life, or to shake his credit by injuring his character, though the answer may tend directly or indirectly to criminate him. If any such question relates to a matter relevant to the suit or proceeding, by which is meant no more than is meant by relevant to a matter in issue, the provisions of sec. 132 are by sec. 147 declared applicable to it. If the question is as to a matter relevant only in so far as affects the credit of the witness by injuring his character, the Court is, by sec. 148, directed to decide whether or not the witness is to be compelled to answer, and may warn the witness that he is not obliged to answer it. When there is a question asked to which the answer may tend to criminate a witness, he may object that it is not as to a matter relevant to a matter in issue, or that, if relevant, it is relevant only as affecting his credit by injuring his character. In the former case, if the question is insisted on, the Court will compel the witness to answer it; in the latter, it will determine whether or not, in reference to the rules which are to guide its decision, it should or should not compel the witness to answer. The Act gives the Judge no option to disallow a question as to matter relevant to the matter in issue. It gives him an option to compel or excuse an answer to a question as to matter which is material to the suit only, so far as it affects the credit of the witness. But inasmuch as no alteration of the law was necessary to secure the production of all evidence that was attainable where a witness voluntarily gave it, the law relating to answers so given was left unaltered. The end desired, the production of evidence from unwilling witnesses, was sought by depriving them of the privilege they had theretofore enjoyed of claiming excuse; but while subjecting them to compulsion, the Legislature, in order to remove any inducement to falsehood, declared that evidence so obtained should not be used against them except for the purpose in the Act declared. The object of the law was to secure evidence which theretofore could not have been obtained, and it was not its object to afford any additional protection to persons who, by an

infraction of the criminal law, had exposed themselves to penalties. If the witness, being entitled to the privilege, did not claim it, but voluntarily answered the question addressed to him, his answer could be used against him in any subsequent proceeding. *Vide* remarks of Turner C. J. in *Queen v. Gopal Dass*, I. L. R. 3 Mad. 271.

(b). This section makes a distinction between those cases in which a witness voluntarily answers a question and those in which he is compelled to answer, and gives him a protection in the latter of these cases only. Protection is afforded only to answers which a witness has objected to give or which he has asked to be excused from giving, and which then he has been compelled by the Court to give—*Queen-Empress v. Ganu Sonba*, I. L. R. 12 Bom. 440.

**Rule of English Law.**—The rule is otherwise in England. There a witness need not answer any question, the answer to which would have a tendency to criminate him ; but he is not exempt from answering a relevant question or producing a relevant document merely on the ground that the answer or the document would expose him to a civil action.

**Shall be compelled.**—(a). In the case of *Queen v. Gopal Dass*, I. L. R. 3 Mad. (F. B.) 271, Turner C. J. said : “The term ‘shall be compelled’ appears to me to be the correlative of the term ‘shall be excused,’ and they pre-suppose the rule that every person giving evidence on any subject, before any Court or person authorized to administer oaths and affirmations, shall be bound to state the truth on such subject (*Oaths Act*, sec. 14), and an authority competent at the time to excuse or compel compliance with this rule. They also suggest that the witness has objected to the question, and has sought and been refused excuse, and even constrained to answer . . . . In the Act we are now considering the secs. 121—132 declare exceptions to the general rule that a witness is bound to state the whole truth, and to produce any documents in his possession or power relevant to the matter in issue ; and in these exceptions the terms ‘compelled’ and ‘permitted’ are so used as to pre-suppose a public officer having authority to compel or to permit, and exercising it at the time the necessity for such compulsion or permission arises . . . . This rule implies an enquiry and decision on the circumstances which excuse or prohibit the compulsion or permission and action on the part of the authority presiding at the examination in pursuance of its decision. The term ‘permitted’ in secs. 125 and 126, and the term ‘compelled’ in secs. 124, 125, 129 and 130 appear to receive their full significance only if understood as applying to the authority which is to enforce the law, and not merely to the implied obligation . . . . If the term ‘compelled’ in the proviso to sec. 132 and ‘compel’

in sec. 148 do not refer to the Court, but to the obligation of the law, then the witness is left without protection, if the Court arrives at an erroneous conclusion as to whether or not the question is as to a matter which the witness is bound to answer, or if he has incautiously answered an irrelevant question. On the other hand, if the term refers to the constraint put upon the witness by the authority before whom he is examined, he is protected whether that authority has decided rightly or wrongly that the question is such as the witness is bound to answer . . . . . The terms of sec. 132, especially when read with the rest of the Act, impel me to the conclusion that protection is afforded only to answers to which a witness has objected or has been constrained by the Court to give."

(b). The mere subpoenaing a witness or ordering him to go into the witness-box does not compel him to give any particular answer or to answer any particular question. The words 'shall be compelled to give' in this section apply to pressure put upon a witness after he is in the box, and when he asks to be excused from answering a question—*Moher Sheikh v. Queen-Empress*, I. L. R. 21 Cal. 392.

**Question must be relevant.**—*Vide Queen v. Gopal Dass*, I. L. R. 3 Mad. 271.

**Protection of witnesses for statements made under examination.**—(a). The answer given under compulsion cannot, unless it be false, be ground for any subsequent criminal proceeding.

(b). A witness in a Court of Justice is absolutely privileged as to anything he may say as a witness having reference to the enquiry on which he is called as a witness—*Seaman v. Netherclift*, L. R. 2 C. P. D. 53. This case has been followed in *Bhikumber Singh v. Becharam Sirkar*, I. L. R. 15 Cal. 264.

(c). M. S. was convicted under sec. 500 of the Indian Penal Code of defaming S. S. by making a certain statement when under cross-examination as a witness before a Court of Criminal Jurisdiction. *Held*, that the conviction was bad. The statements of witnesses are privileged; if false, the remedy is by indictment for perjury, and not for defamation—*Manjaya v. Sessa Shetti*, I. L. R. 11 Mad. 477.

(d). A witness cannot be prosecuted for defamation in respect of statements made by him when giving evidence in a judicial proceeding—*Queen-Empress v. Babaji*, I. L. R. 17 Bom. 127.

**Instances.**—(a). A revenue-officer was charged with the offence of attempting to receive a bribe from certain raiyats who gave evidence for the prosecution, and he was convicted. He subsequently charged the raiyats with having conspired to bribe him, and in their



trial their depositions in the previous case were tendered in evidence for the prosecution. It appeared that the raiyats did not claim an indemnity before criminating themselves. *Held*, that the depositions should have been admitted in evidence—*Queen-Empress v. Samiappa*, I. L. R. 15 Mad. 63.

(b). In the case of *Moher Sheikh v. Queen-Empress*, I. L. R. 21 Cal. 392, the depositions of witnesses given in a counter case were allowed to be used as evidence against them on their trial as accused persons, as it did not appear that they objected to answer any of the questions put to them at the time.

(c). In the case of *Jadunath Dass*, 2 C. L. R. 181, it was held that it is proper for the Magistrate to explain the position of the witness whom he is examining on a point on which he is likely to criminate himself.

**Exceptions to the Rule laid down in the Section.**—(1) Witnesses examined by police-officers investing cases are not bound to answer criminating questions put by such officers. *Vide* secs. 161 and 175, Criminal Procedure Code; (2) Persons examined by Collectors engaged in settlement operations and other proceedings according to Reg. VII of 1822, sec. 19, are not bound to answer any interrogation regarding matters wherein they may have an immediate personal interest in concealing the truth, or in uttering what is false, not being an interest arising out of fear, favour or reward, &c.

**133. An accomplice shall be a competent witness**  
**Accomplice.** against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

**Extent of the Rule.**—This section in unmistakable terms lays it down that a conviction is not illegal if it proceeds upon the uncorroborated testimony of an accomplice, and to hold that corroboration is absolutely necessary, is to refuse to give effect to this provision.\* Sir J. F. Stephen says: "Of course the fact that a man is an accomplice forms a strong objection, in most cases, to his evidence; but every one, I think, must have met with instances in which it is practically impossible to doubt the truth of such evidence, although it may not be corroborated, or although the evidence by which it is corroborated is itself suspicious." But the rule in this section and that in sec. 114, ill. (b), are part of one

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\* *Vide Reg. v. Ramasami Panlayachi*, I. L. R. 1 Mad. 894.

subject, and neither section is to be ignored in the exercise of judicial discretion. As the presumption allowed by illustration (b) of sec. 114, that an accomplice is unworthy of credit, unless he is corroborated in material particulars, has become a rule of practice of almost universal application, it should not be departed from, if it be not clearly shown that there exist circumstances justifying the exceptional treatment of the case. In *Taylor on Evidence*, sec. 171, it is said: "Some few general propositions in regard to matters of fact and the weight of testimony are now universally taken for granted in the administration of justice, and are sanctioned by the usage of the Bench. Such, for instance, is the caution given to juries to regard with distrust the testimony of an accomplice, unless it be materially confirmed by other evidence. There is no rigid presumption of the common law against such testimony, yet experience has shown that it is little worthy of credit, and on this experience the usage is founded." Straight J., in *Queen-Empress v. Ram Saran*, I. L. R. 8 All. 306, observed: "The law in this country, as expressed in secs. 133 and 114 of the Evidence Act, is in no respect different from the law of England. It simply reproduces a rule of practice which the English Courts have recognised, time out of mind, and which, I may add, their tendency of late years has been to apply with great strictness. The rule is this: 'a conviction based on the uncorroborated testimony of an accomplice is not *illegal*, that is, it is not *unlawful*.' But experience teaches us that it is not safe to rely upon the evidence of an accomplice unless it is corroborated; and hence, it is the practice of the Judges, both in England and in India, when sitting alone, to guard their minds carefully against acting upon such evidence when uncorroborated; and, when trying a case with a jury, to warn the jury that such a course is unsafe." In the case of *Queen-Empress v. Chagan Dnyaram*, I. L. R. 14 Bom. 331, Jardine J. remarked: "So long-established a rule of practice as that which makes it prudent, as a general rule, to require corroboration of accomplices, cannot, without great danger to society, be ignored by the Magistrates and Sessions Judges, simply because sec. 133 of the Indian Evidence Act declares that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. As pointed out by Bayley J. in *Maganlal's* case, "the Courts must give proper effect to the long experience of the ways of rogues embodied in sec. 114, ill. (b) of the same Act . . . . The rule in sec. 114 and that in sec. 133 are part of one subject, and both are found in most of the great judgments mentioned in our judgments in that case; and neither section is to be ignored in the exercise of judicial discretion. The illustration (b) is, however, the rule, and when it is departed

from, I think the Court should show, or that it should appear, that the circumstances justify the exceptional treatment of the case. As I said in *Maganlal's* case, it has been held by two eminent Judges, now members of the Judicial Committee of the Privy Council, that it would certainly be unsafe to depart in India from the established practice of England in the application of the rule requiring corroboration. These are the words of Couch C. J., in *Reg. v. Imam* 3 Bom. H. C. R. 59, and they pervade Sir Barnes Peacock's decision in *Elahi Buksh's* case, 5 W. R. Cr. 80. It is not enough for a Court to state the rule *pro forma*, and merely as a reason to evade it; the Courts must act up to it."

**Accomplice.**—The word 'accomplice' is not defined. It seems that the word is not limited to a person who is *particeps criminis*, but includes all persons who are involved in the circumstances in and out of which the crime has arisen, and particularly applies to all persons who give their evidence under a promise of pardon. In the case of *Queen v. Ram Sodoy Chuckerbutty*, 20 W. R. Cr. 19, Glover J. said: "I understand an accomplice witness to be one who is either being jointly tried for the same offence, and makes admissions which may be taken as evidence against a co-prisoner, and which make the confessing accused *pro hoc vice* a sort of witness, or one who has received a conditional pardon on the understanding that he is to tell all he knows, and who may, at any time, be relegated to the dock, if he fails in his undertaking." This view does not seem to us to be quite correct. It is too limited a view.

**Who are Accomplices.**—(a). In the case of *Queen-Empress v. O'Hara*, I. L. R. 17 Cal. 642, the witness Goldsborough was held to be an accomplice within the meaning of the rule under the law existing in our country, inasmuch as he was one of a party of four persons who went out armed at night; broke into a house, from which they took some property; used at other houses, violence, or used menaces of violence by act or word, to persons found there, and who, all four of them, carried off the deceased at dead of night from his house, and took him to the tank. While there, he was shoved into the tank by O'Hara, Goldsborough being close by, and though not aiding, and only so far as his presence might tend to intimidate the deceased from making resistance, not interfering to prevent the deceased from being so treated, Goldsborough being one of the persons who had brought the deceased to the spot.

(b). Where a witness admits that he is cognizant of the crime as to which he testifies, and takes no means to prevent or disclose it, his evidence is no better than that of an accomplice—*Queen v. Chanda Chandaline*, 24 W. R. Cr. 55.

(c). A person who offers bribe to a public officer is an accomplice—*Queen-Empress v. Chagan Dayaram*, I. L. R. 14 Bom. 331. *Vide* also *Queen-Empress v. Maganlal*, I. L. R. 14 Bom. 115.

**Who are not Accomplices.**—(a). Where an informer was, upon his own statement, cognizant of the commission of an offence, and omitted to disclose it for six days, the Court was not prepared to say that he was an accomplice, but held that his testimony was not such as to justify a conviction except where it was corroborated—*Eshan Chundra Chandra v. Queen-Empress*, I. L. R. 21 Cal. 328.

(b). Persons who have been at one time in communication with the criminals, but have subsequently abandoned the conspiracy and denounced it to the public authorities, under whose directions they continue to act till the matter, is so far matured as to ensure conviction. The evidence of such persons does not, in the opinion of Mr. Taylor, require corroboration. *Vide* Taylor, sec. 971. Such persons are more properly informers and spies than accomplices.

**Nature of Accomplice Evidence.**—Accomplices are usually interested and always infamous witnesses, whose testimony is admitted from necessity, it being often impossible, without having recourse to such evidence, to bring the principal offenders to justice. The principal reasons for holding accomplice evidence to be untrustworthy, are : 1st—An accomplice is likely to swear falsely in order to shift the guilt from himself ; 2nd—An accomplice being a participator in crime, and consequently an immoral person, is likely to disregard the sanction of an oath ; 3rd—An accomplice gives his evidence under the promise of a pardon, or in the expectation of an implied pardon, if he discloses all he knows against those with whom he acted criminally, and this hope would lead him to favour the prosecution.\* Tindal C. J., at the trial of Frost, pointed out that there is often a danger that, for the purpose of saving themselves rather than stating the truth, the accomplices will make out a stronger case against the prisoner and more favourable to themselves than the real truth will warrant.

**Corroboration of Accomplice Evidence.**—The practice of requiring corroboration of accomplice evidence, says Mr. Phillips, in his treatise on the Law of Evidence, Vol. I, p. 95, “has obtained so much sanction from legal authority that a deviation from it in any particular case would be justly considered as of questionable propriety.” Although the Judge does not, in express language, declare that a case depending on the unconfirmed evidence of an

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\* *Vide Queen-Empress v. Maganlal*, I. L. R. 14 Bom. 115.

accomplice is insufficient in law to warrant a conviction, but merely advises the jury not to place credit on the evidence, yet, as it is not likely, an instance would arise in which the jury would disregard the advice so given, and convict the prisoner, the substantial result appears to be nearly the same as if the practice had depended upon a rule of law, instead of being only the exercise of the discretion of the presiding Judge. Mr. Goodeve, in his Evidence, p. 306, says: "In the case in which the commission of a crime is sought to be proved against another on the evidence of an accomplice, there is no actual *rule of law* demanding corroboration to justify a conviction. Juries, however, are rarely, if ever, instructed by the Judge to convict in its absence, so that *convention* has supplied what the law does not require." It should be borne in mind that tainted evidence is not made better by being corroborated by other tainted evidence, consequently the evidence of two or more accomplices requires confirmation equally with the testimony of one. In dealing with accomplice evidence, the question always is in any given case—is the approver speaking the truth, not merely when he details the general facts, but when he says that the prisoners participated in the transaction, and did that which it was necessary that he should have done in order for him to become criminally liable to the charge made against him? In saying then, that before the evidence of an accomplice can be safely depended upon, so far as it affects the prisoner, it ought to be *corroborated*, it is to be understood that other evidence from sources independent of the approver should be forthcoming relative to facts which implicate the prisoner in the same way as the story of the approver does.\*

**Corroboration as to the Identity of the Persons implicated.—**  
(a). In *Reg. v. Farlar*, 8 Car. and P. 108, Lord Abinger made the following observations: "I am strongly inclined to think that you will not consider the corroboration in this case sufficient. No one can hear the case without entertaining a suspicion of the prisoners' guilt; but the rules of law must be applied to all men alike. It is a practice, which deserves all the reverence of law, for Judges uniformly to tell juries that they ought not to pay any respect to the testimony of an accomplice, unless he is corroborated in some material circumstance. In my opinion, that corroboration ought to consist of some circumstance that affects the identity of the party accused. A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history without identifying the persons, that is really no corroboration at all."

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\* Vide remarks of Phear J. in *Queen v. Bycant Nath Banerji*, 10 W. R. Cr. 17.

(b). In *Rex. v. Wilkes*, 7 Car. and P. 272, Baron Alderson said : "There is a great difference between confirmations to the circumstances of the felony and those which apply to the individuals charged : the former only prove that the accomplice was present at the commission of the offence ; the latter show that the prisoner was connected with it. This distinction ought always to be attended to . . . The confirmation of the accomplice as to commission of the felony is really no confirmation at all, because it would be a confirmation as much if the accusation were against you and me, as it would be as to those prisoners who are now upon their trial. The confirmation which I always advise juries to require is the confirmation of the accomplice in some fact which goes to fix the guilt on the particular person charged. You may legally convict on the evidence of an accomplice only if you can safely rely on his testimony ; but I advise juries never to act on the evidence of an accomplice, unless he is confirmed as to the particular person who is charged with the offence."

(c). In the case of *Rex. v. Stubbs*, 24 J. L. J. M. C. 16, Baron Parke remarked : "My practice has always been to tell the jury not to convict the prisoner unless the evidence of the accomplice is confirmed, not only as to the circumstances of the crime, but also as to the person of the prisoner." Creswell J. added, "You may take it for granted, that the accomplice was at the committal of the offence, and may be corroborated as to facts ; but that has no tendency to show that the parties were there."

(d). It is an established rule of practice that the accomplice must be corroborated by independent evidence as to the identity of every person whom he impeaches. The accomplice may know every circumstance of the crime, and while relating all the other facts truly, may, in order to save a friend or gratify an animosity, as is alleged in this case, name some person as one of the criminals who was innocent of the crime—*Queen-Empress v. Krishna Bhat*, I. L. R. 10 Bom. 319. *Vide also* (1) *Reg. v. Malapa*, 11 Bom. H. C. R. 196 ; (2) *Reg. v. Budhu Nanku*, I. L. R. 1 Bom. 475.

(e). In the case of *Reg. v. Webb*, 6 C. and P. 595, Williams J. said : "You must show something that goes to bring home the matter to the prisoners. Proving by other witnesses that the robbery was committed in the way described by the accomplice is not such confirmation as will entitle his evidence to credit, so as to affect other persons. Indeed, I think, it is really no confirmation at all, as everyone will give credit to a man who avows himself a principal felon, for at least knowing how the felony was committed. It has

been always my opinion that confirmation of this kind is of no use whatever."

(f). The confirmation should be as to some matter which goes to connect the prisoner with the charge. It is highly dangerous to convict any person of a crime on the evidence of an accomplice unconfirmed with respect to the party accused—*Reg. v. Dyke*, 8 C. and P. 261.

(g). The accomplice must be corroborated, not only as to one, but as to all, of the persons affected by the evidence, and because he may be corroborated in his evidence as to one prisoner, it does not justify his evidence against another being accepted without corroboration—*Queen-Empress v. Ram Sarun*, I. L. R. 8 All. 306. *Vide* also (1) *Queen-Empress v. Baldeo*, I. L. R. 9 All. 509; (2) *Reg. v. Mullins*, 3 Cox C. C. 526. In the case of *Rex v. Stubbs*, Chief Justice Pervis remarked: "When an accomplice speaks as to the guilt of three prisoners, and his testimony is confirmed as to two of them only, it is proper, I think, for the Judge to advise the jury that it is not safe to act on his testimony as to the third person, in respect of whom he is not confirmed, for the accomplice may speak truly as to all the facts of the case, and at the same time in his evidence substitute the third person for himself in his narrative of the case. *Vide* also *Reg. v. Ganubin Dharoji*, 6 Bom. H. C. R. 57; *Reg. v. Imam Valad Baban*, 3 Bom. H. C. R. 57.

**Corroboration as to corpus delicti.**—(a). In the case of *Reg. v. Chatur Purshotam*, their Lordships of the Bombay High Court held that "not only as to persons spoken of by an accomplice must there be corroborative evidence, but which is more important still as to the *corpus delicti*, there must be some *prima facie* evidence pointing the same way to make the evidence of an accomplice satisfactory. As has been recognised in many cases, the man who charges another with the commission of a crime, in which he is himself implicated, requires corroboration as to the particular person, but still more as to the existence itself of any crime, or of the particular crime, from the penalty for which he is made free on the understanding that his testimony will be valuable for the prosecution." *Vide* I. L. R. 1 Bom. 476 (note).

(b). *Vide Case of Colonel Despard*, 28 State Trials, 346.

**Corroboration when considered to be insufficient.**—(a). Facts which do not show the connection of the prisoner with the commission of the offence with which he is charged are no corroboration in the sense in which the word is used in such cases, although they may tend to show that certain portions of which the accomplices say is true—*Queen v. Nawab Jan*, 8 W. R. Cr. 19.

(b). In the case of *Reg. v. Malapabin Kapana*, 11 Bom. H. C. R. 196, the Bombay High Court refused to accept as evidence, corroborative of that of the approver, statements made by him on different occasions to his parents shortly after the murder, pointing out that his statement, whether made at the trial or before the trial, and in whatever shape it comes before the Court, is still only the statement of an accomplice, and does not improve by repetition.

(c). In the case of *Queen-Empress v. Bepin Biswas*, I. L. R. 10 Cal. 970, it was held by the Calcutta High Court that the exact correspondence in details of several statements made by an approver in the course of a trial is not corroborative evidence, such as we ordinarily require to make it safe to convict any particular prisoner.

(d). A confession admissible under sec. 30 *ante* cannot be used as corroborating in any way the evidence of approvers—*Queen v. Jaffir Ali*, 19 W. R. Cr. 57. *Vide* also (1) *Queen v. Uddan Bind*, 19 W. R. Cr. 68 ; (2) *Empress v. Mohanlal*, I. L. R. 4 All. 46.

(e). The corroboration of the evidence of an approver should arise from other evidence relative to facts which implicate the prisoner in the same way as the story of the approver does. Evidence of character and previous conduct of a prisoner being matters of *pre judice*, and not direct evidence of facts relevant to the charge against the prisoner, ought not to be allowed to go to the jury—*Queen v. Byoant Nath Banerji*, 10 W. R. Cr. 17.

(f). In *R. v. Wells*, M. and M. 328, where an indictment was preferred against several persons as principal and accessories, the case was attempted to be proved by the testimony of an accomplice, who was confirmed as to the accessories, but not as to the principal. Littledale J. advised the jury that the case ought not to be considered as proved against the principal, and that all the prisoners ought, therefore, to be acquitted.

(g). In *R. v. Morris*, 7 C. and P. 270, on an indictment against A as principal and B as receiver, where the evidence of an accomplice was corroborated as against A, but not as against B, Alderson B. thought that it was not sufficient.

**Accomplice, a competent witness for the Prisoner.**—"It is quite clear that an accomplice is a competent witness for the prisoner, in conjunction with whom he himself committed the crime—*R. v. Balmore*, 1 Hale P. C. 305. But if he is charged in the same indictment, he cannot be called until after he has been acquitted, or convicted, or a *nolle prosequi* has been entered."—Roscoe, 9th Ed., 131.



**Cautioning the Jury.**—(a). A Judge should caution a jury not to accept the evidence of an approver, unless it is corroborated; the omission to do so amounts to misdirection—*Queen-Empress v. Arumuga*, I. L. R. 12 Mad. 196. *Vide* also (1) *Queen-Empress v. Bepin Biswas*, I. L. R. 10 Cal. 970; (2) *Queen v. Elahi Buksh*, 5 W. R. Cr. 80; (3) *Queen-Empress v. O'Hara*, I. L. R. 17 Cal. 642; (4) *Queen v. Sadhu Mundul*, 21 W. R. Cr. 69; (5) *Queen v. Khotub Sheikh*, 6 W. R. Cr. 17; (6) *Queen v. Bykunt Nath Banerji*, 10 W. R. Cr. 17.

(b). It is undoubted that a Judge, in cases where the material supporting the charge against the prisoner is afforded by the evidence of an approver, is bound very carefully to warn the jury of the infirmity which necessarily attaches to that evidence. He is bound also to call to their attention the circumstance, if it be, in fact, the case, that the approver is speaking under the influence of a conditional pardon, that is, a pardon conditional upon his telling the truth to the satisfaction of the Crown, who is the prosecutor—*Queen v. Mohes Biswas*, 19 W. R. Cr. 16.

(c). It would be error in a summing up if a Judge, after pointing out the danger of acting upon the uncorroborated evidence of an accomplice, were to tell the jury that the evidence of the accomplice was corroborated by evidence of a fact which did not amount to any corroboration at all. Remarks of Bayley J., in *Queen-Empress v. Maganlal*, I. L. R. 14 Bom. 115.

134. No particular number of witnesses shall  
 Number of witnesses. in any case be required for the proof  
 of any fact.

By this section the Judge is left unfettered in determining, in each case, whether the evidence is sufficient. According to the present Act, the evidence of a single witness is sufficient proof of any fact if the Court or the jury believe him.

A conviction upon the statement of a complainant is lawful—*Kulum Mondul v. Bhowaniprosad*, 22 W. R. Cr. 32.

The law of England is different. In regard to treason and misprison of treason, the rule is that no person shall be indicted, tried, or attainted thereof, but upon the oaths and testimony of two lawful witnesses, either both to the same overt act, or one to one, and the other to another overt act of the same treason, unless the accused shall openly without violence confess the same; and further, that, if two or more distinct treasons of divers heads or kinds shall be alleged in one indictment, one witness produced to prove one of

these treasons, and another, another, shall not be deemed to be two witnesses to the same person.

## CHAPTER X.

### OF THE EXAMINATION OF WITNESSES.

135. The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the Court.

**Law as to Examination of Witnesses in Civil Cases.**—*Vide* Chapter XV of the Code of Civil Procedure, and Chapter XXV as to examination by commission.

**Law as to Examination of Witnesses in Criminal Cases.**—*Vide* Chapter XXV of the Code of Criminal Procedure, Chapter XL as to examination by commission, and Chapter XLI as to certain special rules of evidence.

**Evidence of every witness to be taken.**—(a). Every party to a suit is entitled to have all the witnesses whom he desires to call, and is ready at the trial, heard by the Court, whatever opinion the Court may form by anticipation as to the probable value of the evidence when it shall be given—*Looloo Singh v. Rajendur Laha*, 8 W. R. 364. *Vide* also (1) *Nilkanth Surmah v. Soosela Debia*, 6 W. R. 324 ; (2) *Gopee Ojha v. Hurgobind Singh*, 12 W. R. 229.

(b). It is not the business of a Court to determine what witnesses shall be examined. The parties must select their own witnesses and call upon the Court to examine such of them as they may offer for examination—*Morno Moyee Debee v. Bheem Coomar Chowdhry*, 6 W. R. 231.

(c). It is the duty of a Sessions Court to examine all the witnesses sent up by the committing Magistrate. That Court is not justified in rejecting any of the witnesses so sent up, unless it has good reason to believe that such witness came into court-house with a predetermined intention of giving false evidence—*Queen-Empress v. Bankhandi*, I. L. R. 15 All. 6.

(d). In the case of *Jeswant Sing-jee, Ubbay Sing-jee v. Jet Sing-jee, Ubbay Sing-jee*, 2 Moo. I. A. 424, the defendant tendered 58 witnesses

to prove his allegations; the Zillah Court having taken the depositions of thirty of these witnesses, refused to permit the remaining 28 to be examined, on the ground that, being to prove the facts deposed to by those already examined, it was unnecessary to take their depositions. The Judicial Committee remitted the case back to the Sudder Court, being of opinion that the refusal by that Court to admit the examination of the witnesses tendered was irregular, and that no decision could be come to upon the merits under such circumstances.

(c). The fact of a witness not having been named in the plaintiff's list of witnesses, is no ground for refusing to examine him when produced—*Rakhal Dass Mudi v. Protap Chundra Haera*, 12 W. R. 455.

**Duty of Prosecution as to calling Witnesses.**—(a). It is *prima facie* the duty of the prosecution to call all the witnesses who prove their connection with the transactions connected with the prosecution, and who must be able to give important information. The only thing that can relieve the prosecutor from calling such witnesses is the reasonable belief, that, if called, they would not speak the truth—*Empress v. Dhunno Kasi*, I. L. R. 8 Cal. 121. *Vide also* (1) *Queen-Empress v. Ram Sahai Lall*, I. L. R. 10 Cal. 1070; (2) *Queen-Empress v. Stanton*, I. L. R. 14 All. 521; (3) *Empress v. Kali Prosunno*, I. L. R. 14 Cal. 245; (4) *Empress v. Bankhandi*, I. L. R. 15 All. 6.

(b). In a trial before a Court of Session or a High Court, the Public Prosecutor conducting the case for the Crown is not bound to call as a witness for the Crown or to put into the witness-box for the purpose of cross-examination any of the witnesses appearing in the calender as witnesses for the Crown, who, in his opinion, is a false witness, or is likely to give false testimony if put into the witness-box. But he should not refuse to call or put into the witness-box for cross-examination a truthful witness returned in the calender as a witness for the Crown, merely because the evidence of such witness might, in some respects, be favourable to the defence—*Queen-Empress v. Durga*, I. L. R. 16 All. (F. B.) 84. *Vide also* *Queen-Empress v. Tulla*, I. L. R. 7 All. 904.

**Examination of Witnesses by Commission in Criminal Cases.**—

(a). A Hindu lady having been summoned as a witness on behalf of an accused, applied under sec. 503 of the Code of Criminal Procedure to be examined by commission on the ground (*inter alia*) that she was a *pardahnashin*, and that her enforced appearance in the Criminal Court would entail a forfeiture of her dignity and position in Hindu society. *Held*, that such application was properly made under the section, and that, under the circumstances of

the case, the order prayed for could be made—*In the matter of the Petition of Din Tarini Debi*, I. L. R. 15 Cal. 775. *Vide also In the matter of the Petition of Basant Bibi*, I. L. R. 12 All. 69.

(b). Witnesses in criminal cases should not be examined by commission except in extreme cases of delay, expense or inconvenience—*In the matter of the Petition of Farid-un-nissa*, I. L. R. 5 All. 92.

(c). In a criminal case, the issue of a commission would be a most unsatisfactory course of proceeding, and one dangerous to the interests of the prisoner—*Empress v. R. P. Counsell*, I. L. R. 8 Cal. 896.

136. When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise.

Judge to decide  
as to admissibility  
of evidence.

If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact and the Court is satisfied with such undertaking.

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

### *Illustrations.*

(a). It is proposed to prove a statement about a relevant fact by a person alleged to be dead, which statement is relevant

under section thirty-two. The fact that the person is dead must be proved by the person proposing to prove the statement, before evidence is given of the statement.

(b). It is proposed to prove, by a copy, the contents of a document said to be lost. The fact that the original is lost must be proved by the person proposing to produce the copy, before the copy is produced.

(c). A is accused of receiving stolen property knowing it to have been stolen. It is proposed to prove that he denied the possession of the property. The relevancy of the denial depends on the identity of the property. The Court may, in its discretion, either require the property to be identified before the denial of the possession is proved, or permit the denial of the possession to be proved before the property is identified.

(d). It is proposed to prove a fact (A) which is said to have been the cause or effect of a fact in issue. There are several intermediate facts (B, C and D), which must be shown to exist before the fact (A) can be regarded as the cause or effect of the fact in issue. The Court may either permit A to be proved before B, C or D is proved, or may require proof of B, C and D before permitting proof of A.

**Function of the Judge.**—The Judge has not only to decide on the admissibility of evidence, but also on the evidence and facts on which the legal admissibility depends. Questions of relevancy are generally questions of great nicety. The different instances of the connection between cause and effect which occur most frequently in judicial proceedings, and the rules which allow the reception of statements made by third parties under special circumstances, of opinions of experts, of character evidence, and of secondary evidence, have been enumerated in Parts I and II of the Act. The Judge in deciding the question of admissibility should bear those sections in mind. If he has doubts as to the relevancy of a fact suggested, he can, if he thinks it will lead to anything relevant, ask about it himself under sec. 165 *post*.

**Improper Admission or Rejection of Evidence.**—The improper admission or rejection of evidence in India has no effect at all, unless the Court thinks that the evidence improperly dealt with either turned, or ought to have turned, the scale.—*Step. Evi.*, 73. *Vide* sec. 167 *post*.

137. The examination of a witness by the party who calls him shall be called his examination-in-chief.

The examination of a witness by the adverse party shall be called his cross-examination.

The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.

*Vide notes to section 138 post.*

138. Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

**Examination-in-chief.**—Every litigant is entitled himself to examine the witnesses who can give evidence in support of his case, in order that he may bring out the necessary information as fully as he thinks possible, and in the form which he considers most favourable to himself. It follows that evidence given when the party never had the opportunity to examine is not legally admissible as evidence.

**Right to cross-examine.**—It is a well-known rule of law that all witnesses examined-in-chief, or sworn, are subject to cross-examination. The right to cross-examine an adversary's witness is in

accordance with the elementary principles of judicial procedure, and the Evidence Act provides for a cross-examination as part of the record of evidence taken in a judicial proceeding. "It is by no means necessary that the witness should have been actually examined-in-chief; for, if he has been intentionally called and sworn, and is, moreover, a competent witness, the opposite party has, in strictness, a right to cross-examine him, though the party calling him has declined to ask a single question. Where witnesses are simply called to speak to the character of a prisoner, it is not usual to cross-examine them, excepting under special circumstances; but no rule of law expressly forbids this course. Where any person, whether he be a party to the proceedings or not, has made an affidavit which has been filed for the purpose of being used before the Court, he becomes liable to cross-examination, and he cannot be exempted from liability by the subsequent withdrawal of the affidavit."\*

**Limits of cross-examination.**—"The cross-examination is not limited to the matters upon which the witness has already been examined-in-chief, but extends to the whole case; and, therefore, if a plaintiff calls a witness to prove the simplest fact connected with his case, the defendant is at liberty to cross-examine him on every issue, and by putting leading questions to establish, if he can, his entire defence. So far has this doctrine been carried, that even where it was requisite that the substantial, though not the nominal, party in the cause should be called by his adversary, for the sake of formal proof only, it was held that he was thereby made a witness for all purposes, and might be cross-examined as to the whole case. In America, however, the Supreme Court has determined that a party has no right to cross-examine any witness except as to circumstances connected with matters stated in his direct examination; and that if he wishes to examine him respecting other matters, he must do so by making him his own witness and by calling him as such in the subsequent progress of the cause." *Vide Queen v. Ishan Dutt*, 6 B. L. R. App. 88.

**Questions, lawful in cross-examination.**—(a). Besides questions relating to relevant facts, a witness may further be asked in cross-examination questions intended to test his veracity, to discover who he is and what is his position in life, and to shake his credit by injuring his character. *Vide sec. 146 post*.

(b). The moment a witness begins to give evidence which is inadmissible, he should be stopped by the Court. It is not safe to rely on a subsequent exhortation to the jury to reject the hearsay evidence

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\* *Vide Taylor, sec. 1429.*

and to decide on the legal evidence alone—*Queen v. Pitambar Sardar*, 7 W. R. Cr. 25.

**Object and use of Cross-examination.**—The essence of cross-examination is, that it is the interrogation by the advocate of one party of a witness called by his adversary with the object either to obtain from such witness admissions favourable to his cause or to discredit him. Cross-examination is the most effective of all means for extracting truth and exposing falsehood.\* The following passage of Quintilian from his *Inst. Orat.*, lib. v, Ch. 7, De Testibus is worthy of careful study. He says: "In dealing with a witness who is to be compelled to speak the truth against his will, the greatest success consists in drawing out what he wishes to keep back. This can only be done by repeating the interrogation in greater detail. He will give answers which he thinks do not hurt his cause; and afterwards, from many things which he will have confessed, he may be led into such a strait that what he will not say, he cannot deny. For, as in an oration, we generally collect scattered proofs, which singly do not appear to press on the accused, yet, by being put together, prove the charge. So a witness of this sort should be asked many things as to what went before—what came after—as to place, time, and persons, and other things, so that he may fall upon some answer after which he must necessarily either confess what is desired, or contradict his former statements. If this does not happen, it may become apparent that he will not speak, or he may be drawn out and detected in some falsehood foreign to the cause; or by being led on to say more than the matter requires in favour of the accused, the Judge may be led to suspect him, which will damage his cause not less than if he had spoken the truth against the accused. It sometimes happens that the testimony given by a witness is inconsistent with itself. Sometimes (and that is the more frequent case) one witness contradicts another. A skilful interrogation may produce by art that which usually happens accidentally. Apart from the cause, witnesses are usually asked many questions which may be useful, as to the lives of other witnesses, as to their own character and position, any crimes they have committed, their friendship or enmity to the parties,—in the answers to which, they may either make some useful admission, or be detected either in a falsehood or the desire of injuring the opposite party."

**Right of co-accused to cross-examine witness called by another co-accused.**—(a). In the case of *Ram Chand Chatterji v. Hanif Sheikh*, I. L. R. 21 Cal. 401, Trevelyan and Rampini JJ. observed:

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\* Vide *Meer Sujad Ali Khan, Nawat Toolfukar Dowla Bahadoor v. Lalla Kashernath Dass*, 6 W. R. 181.



"We think there might be many cases of failure of justice if a co-accused were not allowed to cross-examine witnesses called by a person whose case was adverse to his, for the effect might be, practically, that a Court might act upon evidence which was not subjected to cross-examination. The Evidence Act gives a right to cross-examine witnesses called by the adverse party."

**Right to cross-examine witness called by the Court.**—A witness called by the Court is liable to be cross-examined by any of the parties to a suit. *Vide* (1) *Tariny Charn Chowdhry v. Saroda Sundari Dassi*, 11 W. R. 146; (2) *Gurudass Roy v. Greesdur Sen*, 11 W. R. 110; (3) *Sharfaras Mollah v. Dhunnoo*, 16 W. R. 257.

**Right of accused persons to recall and cross-examine witnesses for the prosecution.**—(a). When a charge has been framed and the defendant put on his defence, he has a right to have the witnesses for the prosecution recalled for the purpose of cross-examination. *Vide* (1) *J. R. Belilios v. Queen*, 19 W. R. Cr. 53; (2) *In the matter of Thakoor Dyal Sen*, 17 W. R. Cr. 51; (3) *Queen v. Mussumut Itwarya*, 22 W. R. Cr. 14; (4) *Nobin Chunder Banerji, Petitioner*, 25 W. R. Cr. 32; (5) *Queen v. Ram Kishen Halwai*, 25 W. R. Cr. 48; (6) *Talluri Venkayya v. Queen*, I. L. R. 4 Mad. 130; (7) *Queen v. Amiraddin Fakir*, 21 W. R. Cr. 29; (8) *Khurruckdhari Singh*, 22 W. R. Cr. 44.

(b). In the case of *Empress v. Baldeo Sahai*, I. L. R. 2 All., Spankie J. held that the accused has the right to recall and cross-examine the witnesses for the prosecution at any time while he is engaged in his defence and before his trial is concluded. But in the case of *Sheikh Faiz Ali*, I. L. R. 7 Cal. 28, it was held that the right of an accused person to recall and cross-examine the witnesses for the prosecution must be exercised at the time when the charge is read over and explained to him, and if not exercised at the time, it cannot afterwards be insisted on, although it is in the discretion of the Magistrate to recall the witnesses, if he thinks fit.

(c). In the case of *Nilkant Singh v. Queen-Empress*, I. L. R. 20 Cal. 469, Pigot and Hill JJ. held that there is, under sec. 257 of the Criminal Procedure Code, no absolute right of cross-examination, which would enable the accused to recall and cross-examine the witnesses for the prosecution, at any stage of the case, no matter how completely and fully they have already been cross-examined. If the prayer for recall be rejected, the party who thinks himself aggrieved is bound to show that the ends of justice have been in some way frustrated in consequence of the refusal to recall the witnesses.

**Inadmissibility of depositions of witnesses whom the adverse party had no opportunity of cross-examining.**—(a). The test for determining whether the depositions of witnesses, who are absent or who have been examined in a former suit, can be received is whether the party against whom they are to be used had the power to cross-examine. If he could not have cross-examined, the depositions of the witness ought not to be admitted against him—*Meer Sujad Ali Khan, Nawab Zoolfukar Dowla Bahadoor v. Lalla Kashinath Dass*, 6 W. R. 181.

(b). Evidence taken in the absence of a defendant at an *ex-parte* hearing cannot be used against him on a retrial—*Ram Buteh Lall v. Kishoree Mohun Saha*, 12 W. R. 131.

(c). As a general rule, evidence is not legally admissible against a party, who, at the time it was given, had no opportunity of cross-examining the witnesses, or of rebutting their testimony by other evidence—*Gorachand Sirkar v. Ram Narain Chowdhari*, 9 W. R. 587. *Vide also Radha Jiban Mustafi v. Taramani Dass*, 12 Moo. I. A. 380.

(d). A, B and C having been charged with murder before a Magistrate, two vakils presented their vakalatnamas, and applied to be allowed to conduct the defence of the accused. The Magistrate refused permission, and after recording the depositions of the witnesses, committed the accused to take their trial before the Sessions Court. In the Court of the Magistrate the only material evidence for the prosecution was that of three witnesses, who, on being examined in the Sessions Court, denied all knowledge of the facts to which they had deposed before the Magistrate. The Sessions Court, disbelieving the statements made in his Court, thereupon, under sec. 249 of the Code of Criminal Procedure, used the previous depositions as evidence in the case, and mainly upon these convicted the accused. On appeal, it was urged that the previous depositions ought not to have been used as evidence in the case, as the Magistrate had refused to allow their pleaders to appear and cross-examine the witnesses who made the depositions. *Jackson and Tottenham JJ.* held that there was no force in the objection, observing: "It does not appear that the pleaders who were retained by the accused made any attempt to cross-examine the witnesses, for they might have suggested to the accused the proper questions to be put to the witnesses; nor in fact are we disposed to think that at that stage of the proceedings, cross-examination, if resorted to, would have been of any benefit to the accused. Very probably it would not, the Court thinks, have been resorted to at all." *In re Dharu Mundul*, 6 C. L. R. 53. The reasoning of their Lordships does not seem to us

to be at all sound. There is no express legislation, which cripples in the way indicated above the well-recognised right, which an accused person possesses of cross-examining a witness who deposes against him, and the decision is evidently against the principle inunciated in this section and sec. 33 *ante*. It has been held in the case of *Queen-Empress v. Sagal Samba Sahay*, I. L. R. 21 Cal. 642, that an accused person has the right to cross-examine witnesses for the prosecution after their examination at the judicial inquiry before the Magistrate previous to commitment. To deprive an accused person of this invaluable right on such grounds as are mentioned in the judgment under review would not be consonant with the just and equitable principles of our criminal jurisprudence. Before the passing of the Evidence Act, their Lordships of the Calcutta High Court, in the case of *Meer Sujad Ali Khan, Nawab Toolfuka Dowla Bahadoor v. Lalla Kashi Nath Dass*, 6 W. R. 181, said that the test for determining whether the depositions of witnesses, who are absent, or who have been examined in a former suit, can be received is whether the party against whom they are to be used had the power to cross-examine. If he could not have cross-examined, the deposition of the witness ought not to be admitted against him. The case under review would not stand the test.

**Cross-examination of witnesses by the Court.**—It is not the province of the Court to examine the witnesses, unless the pleaders on either side have omitted to put some material question or questions; and the Court should, as a general rule, leave the witnesses to the pleaders to be dealt with, as laid down in this section—*In the matter of Noor Bux Kazi*, I. L. R. 6 Cal. 279. In this case their Lordships (Garth C. J. and Maclean J.) remarked: "We find that, on the examination-in-chief being finished, the Judge questioned almost all the witnesses at considerable length upon the very points to which he must have known that the cross-examination would certainly and properly be directed, the result of this, of course, was to render the cross-examination by the prisoner's pleaders to a great extent ineffective, by assisting the witnesses to explain away in anticipation the points which might have afforded proper ground for useful cross-examination."

**Object of re-examination.**—"The proper object of *re-examination* is to draw forth an explanation of the meaning of the expression used by the witness on cross-examination; and also of the motive or provocation which induced him to use them; to clear up evident misconceptions and errors committed by him while under examination; and to explain new facts which have come out on cross-examination."—Field, 5th Ed., 631.

**139.** A person summoned to produce a document does not become a witness by the mere fact that he produces it, and cannot be cross-examined unless and until he is called as a witness.

Cross-examination of person called to produce a document.

The rule contained in this section is in accordance with the practice under the English law. The section applies equally to civil and criminal proceedings. A witness summoned to produce a document need not attend personally. *Vide* sec. 164 of the Civil Procedure Code.

**140.** Witnesses to character may be cross-examined and re-examined.

Witnesses to character.

The practice in England is not to cross-examine witnesses to the character of parties, unless there is some specific charge on which to found a cross-examination, or at least without giving notice of an intention to cross-examine them; but there is no rule which forbids the cross-examination of such witnesses.

**141.** Any question suggesting the answer which the person putting it wishes or expects to receive, is called a leading question.

Leading questions.

Questions suggesting disputed facts as to which the witness is to testify would come under the category of leading questions. *Vide* Step. Dig., Art. 128. A question may be leading, though made in the common alternative form "whether or not," &c.

**Test of a Leading Question.**—It is sometimes said that the test of a leading question is, whether an answer to it by 'yes' or 'no' would be conclusive upon the matter in issue; but although all such questions undoubtedly come within the rule, it is by no means limited to them. It should never be forgotten that 'leading' is a relative, not an absolute term. There is no such thing as leading in the abstract—for the identical form of question, which would be leading of the grossest kind in one case or state of facts, might be not only unobjectionable, but the very fittest mode of interrogation in another.\*

**Question when objectionable as Leading.**—A question is objectionable as leading when it suggests the answer, not when it merely

\* *Vide* Best, 8th Ed., 591, 592.

directs the attention of the witness to the *subject* respecting which he is questioned. In order to object properly or successfully to questions as leading an accurate idea of what a leading question is, should be formed. In the case of *Nicholls v. Dowding and Kemp*, 1 Starkies' Nisi Prius Rep., 81, Lord Ellenborough observed: "I wish that objections to questions, as leading, might be a little better considered before they are made. It is necessary to a certain extent to lead the mind of the witness to the subject of inquiry. If questions be asked to which the answer 'yes' or 'no' would be conclusive, they would certainly be objectionable; but, in general, no objections are more frivolous than those which are made to questions as frivolous."

142. Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, except with the permission of the Court. The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.

When they must  
not be asked.

**Purport of the Section.**—"As soon as the witness has been duly sworn, it is the province of the party, by whom he is produced to examine him. This is called his *direct examination*, or his *examination-in-chief*; and in this examination, *leading questions*, that is questions which suggest to the witness the answer desired, or which, embodying a material fact, admit of a conclusive answer by a simple negative or affirmative, are not, in general, allowed to be put. Still, this rule must be understood in a reasonable sense; for, if it were not allowed to approach the points at issue by such questions, the examination would be most inconveniently protracted. To abridge the proceedings, and bring the witness, as soon as possible, to the material points on which he is to speak, the counsel may lead him on to that length, and may recapitulate to him the acknowledged facts of the case, which have been already established. The rule, therefore, is not applied to that part of the examination, which is merely introductory of that which is material. With respect even to material points, the Judge, in his discretion, will sometimes allow leading questions to be put in a direct examination; as, for instance, where the witness, by his conduct in the box, obviously appears to be hostile to the party, producing him, or interested for the other party, or unwilling to give evidence. Indeed, if the witness stand in a situation, which, of necessity, makes him adverse to the party calling him, as, if he be

a defendant whom the plaintiff wishes to examine, leading questions, it seems, be asked him as a matter of right."—Taylor, 6th Ed., 1213.

**Reason of the Rule.**—"The chief rule of practice relative to the interrogation of witnesses is that which prohibits leading questions, i.e., questions which directly or indirectly suggest to the witness the answer he is to give. The rule is, that on material points a party must not lead his own witnesses, but may lead those of his adversary; in other words, that leading questions are allowed in cross-examination, but not in examination-in-chief. This seems based on two reasons: First, and principally, on the supposition that the witness has a bias in favour of the party bringing him forward, and hostile to his opponent. Secondly, that the party calling a witness has an advantage over his adversary, in knowing beforehand what the witness will prove, or at least is expected to prove; and that, consequently, if he were allowed to lead, he might interrogate in such a manner as to extract only so much of the knowledge of the witness as would be favourable to his side, or even put a false gloss upon the whole."\*

**Discretionary power of the Judge to relax the general Rule.**—The Judge has a discretionary power of relaxing the general rule, whenever, and under whatever circumstances, and to whatever extent, he may think fit, though the power should only be exercised so far as the purposes of justice plainly require.† It is entirely a question for the presiding Judge to decide whether or not the examination is being conducted fairly, and to allow or disallow leading questions as the case may be.

**Exceptions to the Rule against Leading.**—The section distinctly lays it down that the Court shall permit leading questions as to matters which are (1) *introductory*, (2) *undisputed*, or (3) *sufficiently proved*. (4) If the witness is hostile to the party calling him, the Judge may, in his discretion, allow such party to lead the witness. (*Vide* section 154 *post*). The English text-writers mention the following cases in which leading questions have usually been allowed in examination-in-chief.

(A). **In cases of want of recollection.**—1. A witness will occasionally be allowed to be led, where an omission in his testimony is evidently caused by *want of recollection*, which a suggestion may assist.‡

2. When a witness stated that he could not recollect the names of a firm, so as to repeat them without suggestion, but thought that

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\* *Vide* Best, 8th Ed., 691.

† *Vide* Taylor, 6th Ed., 1215.

‡ *Vide* Taylor, 6th Ed., 1214.

he might possibly recognise them, if suggested, this was permitted to be done.\*

3. Where, from the nature of the case, the mind of the witness cannot be directed to the subject of inquiry without a particular specification of it, as, where he is called to contradict another respecting the contents of a lost letter, and cannot, off-hand, recollect all its contents, the particular passage may be suggested to him, at least after his unaided memory has been exhausted.\*

(B). **For purposes of Identification.**—For the purpose of identifying persons or things, the attention of the witness may be directly pointed to them. Thus, it would be perfectly regular to point to the accused, and ask a witness if that is the person to whom his evidence relates; but in a criminal trial, where the question turns on *identity*, the safest course would be to tell the witness to look round the Court and say if he there saw the person of whom he was speaking, because, if the witness can, unassisted, single out the accused, his testimony will have more weight.

(C). **For purposes of Contradiction.**—Where one witness is called to contradict another as to expressions used by the latter, but which he denies having used, counsel are permitted to ask directly: Did the other witness use such and such expressions? The object of relaxing the general rule being simply to exclude the mind of the other parts of the conversation, which would not be admissible.

(D). **To witness of tender years.**—The Court will sometimes allow a pointed or leading question to be put to a witness of tender years, whose attention cannot otherwise be called to the matter under investigation.

When they may  
be asked.

### 143. Leading questions may be asked in cross-examination.

**Leading Questions in Cross-examination.**—(a). The Judge may not stop leading questions being put in cross-examination to a witness who shows an obvious bias against the party who calls him, and in favour of the cross-examiner; but he is at liberty to intimate that, on the circumstances of the case, the witness should be left to tell his own story, and if this intimation is not complied with, to take it into account in estimating the value of the evidence. "If the witness should display a zeal against the party cross-examining him, great latitude with regard to leading questions may, with propriety, be admitted. But if, on the other hand, he betrays a desire

\* *Vide* Taylor, 6th Ed., 1214.

to serve the party who cross-examines him, although the Court will not in general interfere to prevent the counsel from putting leading questions, yet it has been rightly observed, that evidence obtained in this manner is very unsatisfactory and open to much remark.\*\*

(b). In the case of *R. v. Hardy*, 24 How. St. Tr. 755, Mr. Justice Buller observed: "You may lead a witness, upon cross-examination, to bring him directly to the point, as to the answer; but you cannot go the length of putting into the witness's mouth the very words he is to echo back again."

(c). In a later case, Alderson B. said: "I apprehend you may put a leading question to an unwilling witness, on the examination-in-chief, at the discretion of the Judge; but you may put a leading question in cross-examination, whether a witness be unwilling or not."—*Parkin v. Moon*, T. C. and P. 405.

(d). Mr. Taylor observes: "With respect to the mode of conducting a cross-examination, it is admitted on all hands, that *leading questions may*, in general, *be asked*, but this does not mean that the counsel may go the length of putting the very words into the mouth of the witness, which he is to echo back again; neither does it sanction the putting of a question, which assumes that facts have been proved, which have not been proved, or that particular answers have been given contrary to the fact. The rule ought also to receive some further qualification, where the witness is evidently hostile to the party calling him; for, although it appears in one case, to have been laid down, that leading questions may always be put in cross-examination, whether a witness be unwilling or not, some restriction should surely be imposed, where the witness betrays a vehement desire to serve the cross-examining party. It is no answer to say that the party, who originally called the witness, has brought the evil on his own head; for, a fraudulent witness might purposely conceal his bias in favour of one party, and thus induce the other to call him; or he might be an attesting witness or other person whom it was necessary to examine in order to establish some technical part of the case. To allow such a witness to have the favourable answers suggested to him through the medium of leading questions would be obviously unjust, though, no doubt, this special evil is now capable of being materially mitigated, whether at Nisi Prius, or in the Criminal Courts, by the rule which entitles the counsel, who opens the case on either side, to sum up the evidence, and to point out the unsatisfactory nature of any testimony thus procured."†

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\* *Vide Roscoe*, 9th Ed., 142.

† *Vide Taylor*, 1240.



(e). In America, the Judge, in his discretion, may prohibit leading questions from being put to an adversary's witness, who shows a strong interest or bias in favour of the cross-examining party, and needs only an intimation to say whatever is most favourable to his cause. *Vide Moody v. Rowell*, 17 Pick. 498.

144. Any witness may be asked, whilst under examination, whether any contract, grant or other disposition of property, as to which he is giving evidence, was not contained in a document, and if he says that it was, or if he is about to make any statement as to the contents of any document, which, in the opinion of the Court, ought to be produced, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitle the party who called the witness to give secondary evidence of it.

Evidence as to matters in writing.

*Explanation.*—A witness may give oral evidence of statements made by other persons about the contents of documents if such statements are in themselves relevant facts.

### *Illustration.*

The question is, whether A assaulted B. C deposes that he heard A say to D—‘B wrote a letter accusing me of theft, and I will be revenged on him.’ This statement is relevant, as showing A’s motive for the assault, and evidence may be given of it, though no other evidence is given about the letter.

*Scope of the Section.*—This section merely points out the manner in which the provisions of sections 91 and 92 as to the exclusion of oral by documentary evidence may be enforced by the parties to the suit. The explanation shews that oral evidence of statements made by other persons about the contents of documents may be given, if such statements are in themselves relevant facts. When a statement is a fact in issue, the proof of it is not to be regarded as the proof of the document, and oral testimony in such a case does not

contravene sections 64 and 65 of the Act. Explanation 3 of section 91 makes it clear.

**'The adverse party may object.'**—This clause implies that if any inadmissible statement is allowed to go in without objection, no objection on the ground of its inadmissibility may be taken at later stages of the case. In criminal cases, section 256 of Act X of 1882 declares it to be the duty of the Judge, *in his discretion, to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties*. The Code of Civil Procedure contains no express provision on the subject.

**145. A witness may be cross-examined as to**  
Cross-examina-  
tion as to previous  
statements in  
writing.
**previous statements made by him in**  
**writing or reduced into writing, and**  
**relevant to matters in question, with-**  
**out such writing being shown to him, or being**  
**proved ; but if it is intended to contradict him by**  
**the writing, his attention must, before the writing**  
**can be proved, be called to those parts of it**  
**which are to be used for the purpose of contra-**  
**dicting him.**

**Reason of the Rule.**—It is certainly relevant to put to a witness any question, which, if answered in the affirmative, would qualify or contradict some previous part of his testimony given on the trial of the issue ; and if such question be put, and be answered in the negative, the opposite party may then contradict the witness, and for this simple reason, that the contradiction would qualify or contradict the previous part of the witness's testimony, and so neutralise its effect. In accordance with this general principle, a witness may be cross-examined as to a *former statement* made by him *relative to the subject-matter of the cause*, and inconsistent with his present testimony ; and if he either denies, or does not distinctly admit, that he has made such statement, proof may be given that he did in fact make it ; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.\*

**Extent of the Rule.**—This section applies equally to civil as well as criminal cases. The rule herein laid down applies only if

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\* Vide Taylor, 6th Ed., 1251.

the previous statement in question was relevant to the matter in question. The cross-examining counsel may ask a witness about his previous statements reduced into writing, without shewing to him the document which contains such statements. If the witness denies that he has made them, and if it is intended to contradict him by such writing, then, in the first place, his attention must be drawn to the parts of the former writing, which are to be used for the purpose of contradicting him ; and in the next place, the writing must be proved in the regular way. It is, however, to be remembered that no question respecting any fact irrelevant to the issue can be put to a witness for the mere purpose of contradicting him.

**Mode of contradicting by previous statements.**—It is often important that, when a witness is under cross-examination as to his previous statements, the fact of their having been reduced to writing should be concealed from him. It is only reasonable, however, that when he has given his answer, he should, before the document, which is to be used for the purpose of contradicting him, is proved, be allowed to see it, and have the chance of correcting himself. Questions under this section may, with the permission of the Court, be asked of the witness by the party who called him. Sec. 154, Cun. Ev., 350.

**Police-Diaries.**—(a). Statements of witnesses recorded by a Police-officer while making an investigation under section 161 of the Code of Criminal Procedure form no portion of the Police-diaries referred to in section 172, and an accused person on his trial has a right to call for and inspect such statements and cross-examine the witnesses thereon: (1) *Bikao Khan v. Queen-Empress*, I. L. R. 16 Cal. 610; (2) *Mahomed Ali Haji v. Queen-Empress*, I. L. R. 16 Cal. 612.

(b). A Police-officer cannot, by entering in his diary kept under section 172, Criminal Procedure Code, statements of witnesses recorded by him under section 161, protect them from such use as the law allows, e.g., under sections 145 and 159 of the Evidence Act—*Sheru Sha v. Queen-Empress*, I. L. R. 20 Cal. 642.

(c). If Police-diaries are used by the Police-officer who made them to refresh his memory, or if the Court uses them for the purpose of contradicting such Police-officer, the provisions of section 161 or 145, as the case may be, shall apply.

**What statements are not covered by the Section.**—(a). A was employed by B, at intervals of a week or fortnight, to write up B's account-books, B furnishing him with the necessary information either orally or from loose memoranda. *Held*, that the entries so made could not be given in evidence to contradict A, under this

section, as previous statements made by him in writing. The statements were really made, not by A but by B, under whose instructions A had written them—*Munchershaw Besonji v. The New Dhurumsey Spinning and Weaving Company*, I. L. R. 4 Bom. 576.

(b). "Mere opinion given by a witness on some former occasion would not form matter for contradicting his statement, unless the opinion was in itself *a matter of evidence*. As, for instance, in the case of opinion on handwriting, question of science, or so forth, the witness being examined as an expert. Accordingly, having been asked in cross-examination whether on a former occasion he had not expressed an opinion adverse to the merits of the side, he was then supporting by his testimony, *viz.*, 'that the defendant had not a leg to stand upon,' and having denied it, evidence in contradiction of the denial was refused."—Goodeve, 258.

**When the writing has been lost, &c.**—"The Indian Act, like the English, is silent as to the case in which the writing itself has been *lost or destroyed*, or is *not otherwise forthcoming*. It is apprehended, however, that in such a case the ordinary principle would apply, and secondary evidence become admissible; and this is the opinion entertained by English text-writers in reference to the clause in the English Act."—Goodeve, 258.

**Previous Verbal Statements.**—Previous *verbal* statements may be proved in order to contradict, if only they be relevant to the issue (see para. 3, section 155 *post*). The Act does not provide whether the witness's attention should first be drawn to a previous verbal statement, and whether he should be asked if he made such a statement before evidence can be given to prove such statement; but it seems that here also the circumstances of such previous statement, sufficient to designate the particular occasion, ought to be mentioned to the witness, and he ought to be asked whether or not he made such a statement.

**When the witness neither denies nor admits having made a former Contradictory Statement.**—The Common Law Procedure Act lays down the procedure to be adopted in such cases, in section 23, which runs thus: "If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of cause, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he has made such statement."

146. When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend—

Questions lawful in cross-examination.

(1) To test his veracity ;

(2) To discover who he is, and what is his position in life, or

(3) To shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him, or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

**The object of Sections 146 to 152.**—"The object of these sections is to lay down in the most distinct manner the duty of counsel of all grades in examining witnesses, with a view to shaking their credit by damaging their character. I trust that this explicit statement of the principles, according to which such questions ought or ought not to be asked, will be found sufficient to prevent the growth, in this country, of that which in England has, on so many occasions, been a grave scandal. I think that the sections, as far as their substance is concerned, speak for themselves, and that they will be admitted to be sound by honourable advocates and by the public." Speech of Sir J. F. Stephen on the passing of the Bill.

**Questions lawful in Cross-examination.**—A witness should not be allowed to be asked questions on irrelevant topics for the mere purpose of contradicting him or of proving contradictory statements. Sir J. F. Stephen in his Digest, pp. 196, 197, says : "I shall not believe, unless and until it is so decided upon solemn argument, that by the law of England a person who is called to prove a minor fact, not really disputed, in a case of little importance, thereby exposes himself to having every transaction of his past life, however private, inquired into by persons who may wish to serve the basest purposes of fraud or revenge by doing so. Suppose, for instance, a medical man were called to prove the fact that a slight wound had been inflicted and been attended to by him, would it be lawful, under pretence of testing his credit, to compel him to answer upon oath a series of questions as to his private affairs extending over many years and tending to expose transactions of the most delicate and secret kind,

in which the fortune and character of other persons might be involved. If this is the law, it should be altered."

It is clear that a witness is not to have his whole past life raked up and dragged into publicity merely because he comes forward in obedience to the law to give evidence in Court.

147. If any such question relates to a matter relevant to the suit or proceeding, the provisions of section one hundred and thirty-two shall apply thereto.

When witness  
to be compelled  
to answer

**Scope of this Section and of Section 148.**—In addition to questions which relate to relevant matters, a witness may be asked questions mentioned in sec. 146. If any such question relates to a matter relevant to the suit or proceeding, the provisions of sec. 132 are by this section declared applicable to it. If the question is as to a matter relevant only in so far as affects the credit of the witness by injuring his character, the Court is, by sec. 148 *post*, directed to decide whether or not the witness is to be compelled to answer, and may warn the witness that he is not obliged to answer it. The decision of the Court as to whether or not it shall compel an answer is to be governed by the considerations declared in the section. When there is a question asked as to which the answer may tend to criminate a witness, he may object that it is not as to a matter relevant to a matter in issue, or that, if relevant, it is relevant only as affecting his credit by injuring his character.\*

148. If any such question relates to a matter not relevant to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations :—

Court to decide  
when question  
shall be asked and  
when witness com-  
pelled to answer.

(1) Such questions are proper if they are of such a nature that the truth of the imputation

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\* *Vide Queen v. Gopal Dass*, I. L. R. 8 Mad. 271.

conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies :

(2) Such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies :

(3) Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence :

(4) The Court may, if it sees fit, draw, from the witness's refusal to answer, the inference that the answer if given would be unfavourable.

*Vide notes to sections 146 and 147 ante.*

**Object of the Section.**—This section and sections 151 and 152 provide rules for protecting witnesses from reckless and unjustifiable interrogation. "The words *not relevant to the suit or proceeding*, except in so far as it affects the credit of the witness by injuring *his character*, in the above section, would seem to be synonymous with the words *relevant to the inquiry only in so far as it tends to shake his credit by injuring character* in section 153 *post* ; and the result appears to be, that section 148 assumes it, as a general proposition, that a *witness cannot be compelled to answer irrelevant questions* ; and section 153 assumes it as a further general proposition that, *if a witness do answer an irrelevant question, his answer cannot be contradicted by other evidence, but that his answers to relevant questions may be so contradicted*. Section 148 then provides, that when a question, although irrelevant, affects the credit of the witness by injuring his character, the Court shall have a discretion (for the exercise of which certain rules are laid down) as to compelling an answer ; and section 153 enacts, that where such a question has been answered, the usual rule as to the inadmissibility of evidence to contradict answers to

irrelevant questions shall apply, save and except in two cases ; but that, if the witness answers falsely, he may afterwards be charged with giving false evidence."—Field's Ev., 5th Ed., 644.

**Clause (2).**—The interests of justice, says Mr. Taylor, "can seldom require that the errors of a man's life, long since repented of and forgiven by the community, should be recalled to remembrance at the pleasure of any future litigant."

**Clause (4).**—See illustration (A), section 114 *ante*. In drawing an unfavourable inference from a witness's refusal to answer such a question, it should be remembered that "a perfectly honourable but excitable man may occasionally repudiate a question which he regards as an insult, and to infer dishonour from his conduct would, of course, be unjust ; but, generally speaking, an honest witness will be eager to rescue his character from suspicion, and will at once deny the imputation, rather than rely on his legal rights, and refuse to answer the offensive interrogatory."

149. No such question as is referred to in section one hundred and forty-eight ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well-founded.

Question not to be asked without reasonable grounds.

### *Illustrations.*

(a). A barrister is instructed by an attorney or vakil that an important witness is a dákáit. This is a reasonable ground for asking the witness whether he is a dákáit.

(b). A pleader is informed by a person in Court that an important witness is a dákáit. The informant, on being questioned by the pleader, gives satisfactory reasons for his statement. This is a reasonable ground for asking the witness whether he is a dákáit.

(c). A witness, of whom nothing whatever is known, is asked at random whether he is a dákáit. There are here no reasonable grounds for the question.

(d). A witness, of whom nothing whatever is known, being questioned as to his mode of life and means of living, gives unsatisfactory answers. This may be a reasonable ground for asking him if he is a dákáit.



**Reasonable grounds.**—"The illustrations show that the reasonable grounds which justify such questions may be much slighter than would justify a man in making an imputation under other circumstances. A barrister who is told a discrediting fact by an attorney or vakil, or a pleader who hears such a fact from a person who appears to know about it, is justified in so far assuming its truth as to question a witness about it; and he may even do so with no other justification than the witness's unsatisfactory replies."—Cun. Evi., 354.

150. If the Court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any barrister, pleader, vakil or attorney, report the circumstances of the case to the High Court or other authority to which such barrister, pleader, vakil, or attorney is subject in the exercise of his profession.

Procedure of Court in case of question being asked without reasonable grounds.

**Import of the Section.**—In order to understand fully the import of this section, it is necessary to know what the sections in the original draft were. It was therein provided in substance "that no person should be asked a question which reflected on his character, as to matters irrelevant to the case before the Court, without written instructions; that, if the Court considered the question improper, it might require the production of the instructions; and that the giving such instructions should be an act of defamation, subject, of course, to the various rules about defamation laid down in the Penal Code. To ask such question without instructions was to be a contempt of Court in the person asking them, but was not to be defamation." To the original sections the following objections were taken: 1st—That the difficulty of obtaining the written instructions would be practically insuperable; 2nd—That the Native Bar throughout the country were already subject to forms of discipline, which were practically sufficient; 3rd—That in this country, the administration of justice is carried on under so many difficulties, and is so frequently abused to purposes of the worst kind, that it is of the greatest importance that the character of witnesses should be open to full inquiry. These reasons satisfied the Committee in charge of the Bill, and sections 146 to 152 were substituted in their places.

**Privilege of Counsel.**—(a). The utterances of counsel as such during the conduct of a case in Court may be classed with the

unquestionable instances of absolute privilege. A counsel is justified in acting entirely *on his instructions*, and also in giving them in evidence if pertinent to the matter in issue, and he need not inquire into their truth or falsehood.\*

(b). The advocate is trusted with interests and privileges and powers, almost to an unlimited degree. The law trusts him with a privilege in respect of liberty of speech, which is, in practice, bounded only by his own sense of duty, and he may have to speak upon subjects concerning the deepest interests of social life and the innermost feelings of the human soul.†

(c). In *Munster v. Lamb*, the Master of the Rolls observed: "If any one needs to be free of all fear in the performance of his arduous duty, an advocate is that person. His is a position of difficulty; he does not speak of that which he knows, but he has to argue and support a thesis which it is for him to contend for; he has to do this in such a way as not to degrade himself, but he has to do it under difficulties which are often pressing. If, in this position of difficulty, he had to consider whether everything which he uttered were false or true, relevant or irrelevant, he could not possibly perform his duty with advantage to his client; and the protection which he needs and the privilege which must be acceded to him is needed and accorded above all for the benefit and advantage to the public."

(d). In the case of *Sullivan v. Norton*, I. L. R., 10 Mad. (F. B.) 28, the Madras High Court held that an advocate in this country cannot be proceeded against either civilly or criminally for words uttered in his office as advocate. Collins C. J., who delivered the judgment of the Full Bench, observed: "I think that the advocates in this country have and should have the same privileges in respect of liberty of speech they have so long enjoyed in England; and that in this country it would be beyond measure embarrassing to the advocate and disastrous to the interests of the client, if the advocate was exposed to the liability of a criminal or civil charge for defamation for words uttered in Court."

(e). The pleader for the defence in commenting on some of the witnesses for the prosecution called them loafers. Thereupon, one of those witnesses prosecuted the pleader for defamation. The Bombay High Court held that in the case of an advocate, where express malice is absent, a Court, having due regard to public policy, would be extremely cautious before depriving him of the protection of exception 9 to section 499 of the Indian Penal Code—*In re Nagarji Trikamji*, I. L. R. 19 Bom. 340.

\* *Vide* *Hudgson v. Scarlett*, 1 B. and Ald. 232; *Brook v. Montague*, Cro. Jac. 90.

† *Vide* *Kennedy v. Brown*, 32 L. J. C. P. (N. S.) 137.

151. The Court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

"The result of sec. 151 will be, that the Court cannot forbid indecent or scandalous questions, if they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed. If they have, however, merely *some bearing* on the questions before the Court, the Court has a discretion and *may* forbid them."—Field's Ev., 5th Ed., 647.

A witness will be required on cross-examination to answer any question, however disgracing, if, in the discretion of the Judge, such question fairly tends to test and characterise the veracity or general credibility of the witness.

"If a woman prosecuted a man for picking her pocket, it would be monstrous to inquire whether she had not had an illegitimate child ten years before, though circumstances *might* exist, which might render such an inquiry necessary. For instance, she might owe a grudge to the person against whom the charge was brought on account of circumstances connected with such a transaction, and have invented the charge for that reason."—Sir J. F. Stephen's General View of the Criminal Law of England.

152. The Court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form.

153. When a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall

Indecent and scandalous questions.  
Questions intended to insult or annoy.  
Exclusion of evidence to contradict answers to questions testing veracity.

be given to contradict him; but if he answers falsely, he may afterwards be charged with giving false evidence.

*Exception 1.*—If a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction.

*Exception 2.*—If a witness is asked any question tending to impeach his impartiality, and answers it by denying the facts suggested, he may be contradicted.

### *Illustrations.*

(a). A claim against an underwriter is resisted on the ground of fraud. The claimant is asked whether, in a former transaction, he had not made fraudulent claim. He denies it. Evidence is offered to show that he did make such a claim. The evidence is inadmissible.

(b). A witness is asked whether he was not dismissed from a situation for dishonesty. He denies it. Evidence is offered to show that he was dismissed for dishonesty. The evidence is not admissible.

(c). A affirms that on a certain day he saw B at Lahore. A is asked whether he himself was not on that day at Calcutta. He denies it. Evidence is offered to show that A was on that day at Calcutta. The evidence is admissible, not as contradicting A on a fact which affects his credit, but as contradicting the alleged fact that B was seen on the day in question in Lahore. In each of these cases the witness might, if his denial was false, be charged with giving false evidence.

(d). A is asked whether his family has not had a blood feud with the family of B against whom he gives evidence. He denies it. He may be contradicted on the ground that the question tends to impeach his impartiality.

*Scope of the Section.*—This section is limited to matters which may be introduced by cl. 3, sec. 146 *ante*. The reason of the rule is

that if such evidence were allowed, the suit would become practically interminable by digressing into various collateral issues.

**Exceptions.**—The exceptions are wholesome, as they are easily proved and strike at the very root of the witness's trustworthiness. The first exception is taken from the 25th section of the Common Law Procedure Act, 1854; the second is in accordance with the opinions of the Barons of the Exchequer in the case of *Attorney-General v. Hitchcock*, 11 Jur. 478.

**Impeaching the Impartiality of a Witness.**—The impartiality of a witness may be impeached, says Mr. Best, "by proving misconduct connected with the proceedings or other circumstances showing that he does not stand indifferent between the parties. Thus, it may be proved that a witness has been bribed to give his evidence or has offered bribe to others to give evidence for the party whom he favours, that he has used expressions of animosity and revenge towards the party against whom he bears testimony, &c." It may also be that the witness has been endeavouring to suborn witness against a party to the proceeding.

**Inadmissible Evidence.**—If a man deny having made a promissory note, and the fact whether he had or not is relevant to the trial only in so far as it might affect his credit, no contradiction of his statement could, according to the principle of this section, in strictness, be received—*Reg. v. Parbhudas Ambaram*, 11 Bom. H. C. R. 90.

**III. (c).**—Evidence was held to be admissible to prove that two witnesses for the prosecution were at Dhond till the afternoon of the day of the fire, and to show that it was highly improbable that they should have left Dhond at about 11 A.M. or noon, and therefore highly improbable that the accused should have been seen by them at Wahie as they asserted at 1 P.M. The case was like that in ill. (c), which shows that the admissibility of the testimony does not depend on the cross-examination of the witnesses to be contradicted—*Reg. v. Shakaram Mukundji*, 11 Bom. H. C. R. 166.

154. The Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

This section is an extension of section 142. *Vide* notes under that section.

**When a party may be allowed to cross-examine his own witness.**—It seems that the Judge may allow the party calling a witness to cross-examine him when he proves hostile as opposed to merely 'unfavourable.' The Court will properly allow cross-examination when a witness unexpectedly turns out to be hostile to the party who calls him, or is manifestly interested for the other party, or is unwilling to give evidence; or if the witness stand in a situation which naturally makes him adverse to the party who desires his testimony, as for example, a defendant called as the plaintiff's witness. *Vide Radha Jiban Mustafi v. Tara Moni Dasi*, 12 Moo. I. A. 380.

**Hostile.**—The mere fact that at a Sessions trial a witness tells a different story from that told by him before the Magistrate does not necessarily make him hostile. The proper inference to be drawn from contradictions going to the whole texture of the story is not that the witness is hostile to this side or that, but that the witness is one who ought not to be believed unless supported by other satisfactory evidence—*Kalachand Sarkar v. Queen-Empress*, I. L. R. 13 Cal. 53.

155. The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him :—

(1) By the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit ;

(2) By proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence ;

(3) By proof of former statements inconsistent with any part of his evidence which is liable to be contradicted ;

(4) When a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

*Explanation.*—A witness declaring another witness to be unworthy of credit may not, upon his

examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives cannot be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.

### *Illustrations.*

(a). A sues B for the price of goods sold and delivered to B. C says that he delivered the goods to B. Evidence is offered to show that, on a previous occasion, he said that he had not delivered the goods to B. The evidence is admissible.

(b). A is indicted for the murder of B. C says that B, when dying, declared that A had given B the wound of which he died. Evidence is offered to show that, on a previous occasion, C said that the wound was not given by A or in his presence. The evidence is admissible.

**English Law.**—In addition to counter-proofs and cross-examination, there are three ways of throwing discredit on the testimony of an adversary's witness : 1st—By giving evidence of his general bad character for veracity, i.e., the evidence of persons who depose that he is in their judgment unworthy of belief, even though on his oath ; 2nd—By showing that he has on former occasions made statements inconsistent with the evidence he has given. But this is limited to such evidence as is relevant to the cause, for a witness cannot be contradicted on collateral matters ; 3rd—By proving misconduct connected with the proceedings, or other circumstances showing that he does not stand indifferent between the contending parties. Thus, it may be proved that a witness has been bribed to give his evidence, or has offered bribes to others to give evidence for the party whom he favours, or that he has used expressions of animosity and revenge towards the party against whom he bears testimony, &c.—*Best*, 8th Ed., 593, 594. By the English law, it is necessary, before giving evidence for the purpose of discrediting a witness, to lay a foundation for the evidence to be given by the interrogation of the witness himself and his denial. This is not necessary under the present Act.

**Mode of discrediting a witness.**—The credit of a witness may be directly impeached by such questions as are provided for in sections 146, 154 or 155. It may be indirectly impeached by evidence disproving the facts which he has asserted.

**Which is liable to be contradicted.**—The words “which is liable to be contradicted” in this section mean “which is relevant to the issue”—*R. Khadijah Khanum v. Abdool Kurream Shereali*, I. L. R. 17 Cal. 344.

**When a party may discredit his own witness.**—According to the Law of England, “a party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall, in the opinion of the Judge, prove adverse, that is, hostile, as contra-distinguished from being merely unfavourable, contradict him by other evidence, or *by the leave of the Judge*, prove that he has made at other times a statement inconsistent with his present testimony.” According to the law of our country, a party may impeach the credit of his own witness, by evidence that he is generally unworthy of credit.

**Proper questions under cl. (1).**—The proper question to be put to a witness who is called to impeach another witness is whether, from his knowledge of his general character, he thinks that he is deserving of belief upon his oath. It is very dangerous in cross-examination to ask a witness his reasons for believing a witness to be untrustworthy. He is, by such a question, enabled to state any unfavourable fact without fear of contradiction.

**Evidence of offer of Bribe.**—No proof of the offer of a bribe can be given if there was no acceptance, and the “reason is that it is totally irrelevant to the matter in issue that some person should have thought fit to offer a bribe to the witness to give an untrue account of a transaction, and it is of no importance whatever if that bribe was not accepted. It is no disparagement to a man that a bribe is offered to him; it may be a disparagement to the person who makes the offer”—*Attorney-General v. Hitchcock*, 1 Ex. 91.

**Statements recorded under section 162 of the Criminal Procedure Code.**—The person whose statements are reduced to writing by a police-officer under section 162 of the Criminal Procedure Code may be questioned about them, and with a view to impeach his credit, the police-officer, who recorded the statements or any other person in whose hearing they were made, can be examined on the point under this section—*Queen-Empress v. Sitaram Vitthal*, I. L. R. 11 Bom. 657. *Vide also Queen-Empress v. Madho*, I. L. R. 15 Mad. 25.

**Statements recorded under section 161 of the Code of Criminal Procedure.**—(a). An accused person has the right to call for statements recorded under section 161 of the Criminal Procedure Code, and to cross-examine the witnesses thereupon: (1) *Bikao Khan v. Queen-Empress*, I. L. R. 16 Cal. 610; (2) *Mahomed Ali Hadji v.*



*Queen-Empress*, I. L. R. 16 Cal. 612; (3) *Queen-Empress v. Madho*, I. L. R. 15 Mad. 25.

(b). A police-officer, by inserting in the special diary statements which can only have been made to him under section 161, cannot protect such statements from being used in the way that the law allows, e.g., under sections 145 and 159 of the Evidence Act—*Sheru Sha v. Queen-Empress*, I. L. R. 20 Cal. 642.

156. When a witness whom it is intended to corroborate gives evidence of any relevant fact, he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occurred, if the Court is of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies.

Questions tending to corroborate evidence of relevant fact, admissible.

### *Illustration.*

A, an accomplice, gives an account of a robbery in which he took part. He describes various incidents unconnected with the robbery which occurred on his way to and from the place where it was committed. Independent evidence of these facts may be given in order to corroborate his evidence as to the robbery itself.

*Vide notes to sec. 155 ante.*

This section provides for the admission of evidence necessary to test the truthfulness of the witness. Evidence of surrounding circumstances is, in the majority of cases, very useful for testing the accuracy of the testimony of the witness, as it opens a vast field for cross-examination and prepares the ground for corroboration or contradiction as the case may be.

157. In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

Former statements of witness may be proved to corroborate later testimony as to same fact

**Value of such Corroborative Evidence.**—The corroborative value of such previous statements is generally of the weakest character, and Judges should distinguish it from really corroborative evidence.

(a). In *R. v. Malapabin Kapana*, 11 Bom. H. C. R. 196, Nana-bhai Haridas J. observed: "Section 157 of the Evidence Act, no doubt, provides that any former statements made by a witness at or about the time when the fact in issue took place, or before any competent authority, may be proved to corroborate his testimony; and, accordingly, the Session Judge has made use of Murgias' statements made on different occasions to his parents and to police-officers, shortly after the murder. But such corroboration, we think, hardly suffices. It can scarcely be said to answer the purpose for which juries are advised by Judges to require the evidence of an accomplice to be confirmed. From the position, in which he stands, it is considered unsafe to act upon his evidence alone. Hence, the rule requiring confirmation of it as to the prisoners by some independent, reliable evidence. But his statement, whether made at the trial or before the trial, and in whatever shape it comes before the Court, is still only the statement of an accomplice, and does not at all improve in value by repetition."

(b). Exact correspondence in details of several statements made by an approver in the course of a trial is not corroborative evidence, such as is ordinarily required to make it safe to convict a particular prisoner—*Queen-Empress v. Bepin Biswas*, I. L. R. 10 Cal. 970.

(c). In 1874, five out of six persons, who were named as having committed a murder, were arrested, and after inquiry before a Magistrate, were tried before the Court of Sessions and convicted. At the time of the inquiry, the sixth accused person absconded. In 1886, the absconder was apprehended and tried before the Court of Sessions upon the charge of murder. At that time all the witnesses, except one, were dead. The surviving witness now also gave evidence against the prisoner. The deposition taken of the surviving witness in 1874 was held admissible under this section as corroboration of the evidence given at the trial of the prisoner—*Queen-Empress v. Ishri Singh*, I. L. R. 8 All. 672.

158. Whenever any statement, relevant under

What matters may be proved in connection with proved statement relevant under section 32 or 33.

section thirty-two or thirty-three, is proved, all matters may be proved, either in order to contradict or to corroborate it, or in order to impeach

or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.

This section provides for the reception in evidence of matters for testing or corroborating statements receivable as evidence under section 32 or 33 *ante*.

159. A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.

The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.

Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document: Provided the Court be satisfied that there is sufficient reason for the non-production of the original.

An expert may refresh his memory by reference to professional treatises.

**The Rule of Law.**—Though a witness can testify only to such facts as are within his knowledge and recollection, he is sometimes permitted to refresh and assist his memory, by the use of a written instrument, memorandum, or entry in a book. But this course, except in the case of scientific witnesses referring to professional books as

the foundation of their opinion, can only be adopted where the writing has been made, or its accuracy recognised, at the time of the fact in question, or, at furthest, so recently afterwards, as to render it probable that the memory of the witness had not then become defective.\* A witness will be permitted to refresh his memory by an examination of memoranda reasonably contemporaneous with the transaction to which they relate, regarding dates, figures, results of calculation, minutes of testimony and the like, whether such memoranda be made by the party himself or by any other person, provided the requirements of the sections are satisfied.

**The time mentioned in the section.**—As to what is the time, within which the Court will consider it likely that a transaction would be fresh in the witness's memory, much must depend on the circumstances of each case. If the witness will swear positively that the notes, though made *ex post facto*, were taken down at a time when he had distinct recollection of the facts there narrated, he will, in general, be allowed to use them, though they were drawn up a considerable time after the transactions had occurred. If, however, the memoranda were prepared subsequently to the event at the instance of the party calling the witness, or of his attorney, they can, in no case, be permitted to be used, for otherwise a door might be opened to the grossest fraud.†

**Documents which may be used for Refreshing memory.**—(a). The plaints and records in a number of suits upon bonds instituted by the same plaintiff against different persons were destroyed by fire. The suits were re-instituted, and duplicate copies of the plaints were filed. The only evidence of the execution of the bonds, from which the plaints were prepared, consisted of a register kept by the plaintiff's gomastas, in which the names of the executants, the quantity of the rice lent to them, its price, the instalments in which the price was to be paid, and the names of the attesting witnesses to the bonds, were entered in tabular form. *Held*, that though the register was not secondary evidence of the contents of the bonds, yet it was a document which might be referred to by a witness for the purpose of refreshing his memory under this section; and if so, he might be able, by the aid of the register, to give evidence both as to the execution and contents of the bonds upon which the Court could act and pass a decree in favour of the plaintiff—*Taruck Nath Mullick v. Jeamut Nooya*, I. L. R. 5 Cal. 353.

(b). A person who has prepared *jummawasil-banki* papers, on receiving payment of rents, may refresh his memory from such

\* *Vide* Taylor, 6th Ed., 1215, 1216.

† *Vide* Taylor, 6th Ed., 1216.

papers when giving evidence as to the amount of rent payable—*Akhil Chundra Chowdhary v. Nayun*, I. L. R. 10 Cal. 248.

(c). A document, inadmissible for want of a stamp or registration, may be used for the purpose of refreshing the memory of a witness. *Vide* Taylor, sec. 1411.

(d). A surveyor may refresh his memory from the printed copy of a report compiled from his original notes, of which it is substantially, though not literally, a copy—*Horne v. Mackenzie*, 6 C. L. and Fin. 628.

(e). Where the document consists of entries or memorandum compiled from notes or entries made at the time, it may be still regarded as an original document, if it falls within the requirements of the two first sub-sections of this section—*Burton v. Phemer*, 2 A. and E. 344.

**Memorandum made by Police-officer.**—(a). A prisoner, on his trial, is not entitled to insist that a memorandum made by a police-officer under the provisions of sec. 119 (Act X of 1872) of the Code of Criminal Procedure shall, in the course of the examination of such officer, be referred to by the latter, for the purpose of refreshing his memory—*Empress v. Kalicharn Chunari*, I. L. R. 8 Cal. 376. *Vide* also *Raghuni Singh v. Empress*, I. L. R. 9 Cal. 455.

(b). A statement reduced to writing by a police-officer under sec. 162 (Act X of 1882) cannot have the effect of a deposition; but though it is not evidence, the police-officer, to whom it was made, may use it to refresh his memory under this section—*Queen-Empress v. Sitaram Vithal*, I. L. R. 11 Bom. 657. *Vide* also *Reg. v. Uttamchand*, 11 Bom. H. C. R. 120.

160. A witness may also testify to facts mentioned in any such document as is mentioned in section one hundred and fifty-nine, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document.

Testimony to facts stated in document mentioned in section 159.

### *Illustration.*

A book-keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the

books were correctly kept, although he has forgotten the particular transactions entered.

*Vide* notes to sec. 159 *ante*.

**Document.**—The word ‘document’ in this section may include ‘copy of such document’ to which reference is made in the last paragraph of sec. 159 *ante*. The English law is that “if the copy be an imperfect copy, or be not proved to be a correct copy, or if *the witness has no independent recollection of the facts narrated therein*, the original must be used.”\*

**Independent recollection unnecessary.**—Thus, a solicitor who has made a parol lease and entered a memorandum of it in his book may refer to it, though he has no independent recollection of the transaction; so, a barrister to the notes on his brief, in order to show that a witness has varied in his statement. So, also, a witness may look at his own attestation to a deed and say that from seeing it he is sure that he saw the party execute it, though he has no recollection of the fact; and a banker’s clerk may, from seeing his writing on a bill of exchange, be able to swear that it passed through his hands.†

161. Any writing referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party if he requires it; such party may, if he pleases, cross-examine the witness thereupon.

Right of adverse party as to writing used to refresh memory.

**English Law.**—The English rule of law upon this point is that the opposite party may inspect the document and cross-examine the witness on such entries as have been already referred to, without putting in the document as part of his own evidence; but that if he goes further and asks questions as to other parts, he makes it his own evidence.‡ No such distinction is made by the present Act.

**Right of Inspection.**—In all cases where documents are used for the purpose of refreshing the memory of a witness, it is usual and reasonable, and if the witness has no independent recollection of the fact, it is necessary, that they should be produced at the trial, and that the opposite counsel should have an opportunity of inspecting them, in order that on cross or re-examination, he may have the benefit of the witness’s refreshing his memory by every part.§

\* *Vide* Taylor, sec. 1409.

† *Vide* Taylor, sec. 1412.

‡ *Vide* Taylor, sec. 1413.

§ *Vide* Taylor, 6th Ed., 1221.

When and how such right should be exercised.—(a). In the matter of the *Petition of Jhubboo Mahton*, I. L. R. 8 Cal. 739, Field J. observed : “The grounds upon which the opposite party is permitted to inspect a writing and to refresh the memory of a witness are threefold : (1) to secure the full benefit of the witness's recollection as to the whole of the facts ; (2) to check the use of improper documents ; and (3) to compare his oral testimony with his written statement. The opposite party may look at the writing to see what kind of writing it is, in order to check the use of improper documents ; but I doubt whether he is entitled, except for this particular purpose, to question the witness as to the other and independent matters contained in the same series of writings. I think, therefore, that, at the particular stage at which the prisoners' counsel asked to see what he called the diary, by which, I presume, he meant the whole series of writings containing the statements of all the persons examined by the police-officer, he was not entitled to exercise the right claimed in the particular way claimed by him.”

162. A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.

The Court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility.

If for such a purpose it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence ; and if the interpreter disobeys such direction, he shall be held to have committed an offence under section one hundred and sixty-six of the Indian Penal Code.

**Power of Court to inspect a Document objected to be produced.**—In order to judge of the admissibility of a document which falls under sec. 130 or 131, the Court may inspect such document unless it refers to matters of State, and consequently the witness, who objects to its production, is bound to bring it with him to Court, and the Court should be governed by all the circumstances of each case in determining whether the order for production would be just or not.

163. When a party calls for a document which he has given the other party notice to produce, and such document is produced and inspected by the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so.

Giving, as evidence, of document called for and produced on notice.

**Reason of the Rule.**—The production of papers upon notice does not make them evidence in the cause, *unless the party calling for them inspects them*, so as to become acquainted with their contents, in which case he is obliged to use them as his evidence, at least if they be in any way material to the issue. The reason for this rule is, that it would give an unconscionable advantage to a party to enable him to pry into the affairs of his adversary, without, at the same time, subjecting him to the risk of making, whatever he inspects, evidence for both parties.\* This wholesome rule of English law has been embodied in this section with this reservation that such documents should be given in evidence if the party producing them requires it to be done.

164. When a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court.

Using, as evidence, of document, production of which was refused on notice.

### *Illustration.*

A sues B on an agreement and gives B notice to produce it. At the trial, A calls for the document and B refuses to produce

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\* *Vide Taylor, sec. 1614.*



it. A gives secondary evidence of its contents. B seeks to produce the document itself to contradict the secondary evidence given by A, or in order to show that the agreement is not stamped. He cannot do so.

**Rule of Law.**—If a party, after notice, declines to produce a document, when formally called upon to do so, he will not afterwards be allowed to change his mind; and, therefore, if he once refuses, he cannot, when his opponent has proved a copy and is about to have it read, produce the original, and object to its admissibility without the evidence of attesting witnesses; neither, after such refusal, will he be permitted to put the document into the hands of his opponent's witnesses for the purpose of cross-examination, or to produce and prove it as part of his own case.\*

165. The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing: and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved:

Provided also that this section shall not authorise any Judge to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer or produce under sections one hundred and twenty-one to one hundred and thirty-one both inclusive, if the question were asked or the document were

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\* *Vide* Taylor, secs. 1616 and 1818.

called for by the adverse party ; nor shall the Judge ask any question which it would be improper for any other person to ask under section one hundred and forty-eight or one hundred and forty-nine ; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.

**Object of the Section.**—The object of this section is to enable the Judge either to discover a relevant fact, or to obtain proper proof of it. Therefore, there is no relaxation of the rules as to relevancy. The power hereby given should be exercised with due discretion, and the Judge should not receive illegal evidence at pleasure. He should bear in mind that this power has been given to him to prevent justice being defeated by mere technicality and to secure indicative evidence. Sir J. F. Stephen, in his Introduction to the Evidence Act, at page 162, says : “ A Judge or Magistrate in India frequently has to perform duties which in England would be performed by police-officers or attorneys. He has to sift out the truth for himself as well as he can, and with little assistance of a professional kind. Sec. 165 is intended to arm the Judge with the most extensive power possible for the purpose of getting at the truth. The effect of this section is that in order to get to the bottom of the matter before it, the Court will be able to look at and inquire into every fact whatever. It will not, however, be able to found its judgment upon the class of statements in question for the following reasons :—If this were permitted, it would present a great temptation to indolent Judges to be satisfied with second-hand reports.

“ It would open a wide door to fraud. People would make statements for which they would be in no way responsible, and the fact that these statements were made, would be proved by witnesses who knew nothing of the matter stated. Every one would thus be at the mercy of people, who might choose to tell a lie, and whose evidence could neither be tested nor contradicted.

“ Suppose that A, B, C and D give to E, F and G, a minute detailed account of a crime which they say was committed by Z. E, F and G repeat what they have heard correctly. A, B, C and D disappear or are not forthcoming. It is evident that Z would be altogether unable to defend himself in this case, and that the Court would be unable to test the statements of A, B, C and D. The

only way to avoid this is to exclude such evidence altogether, and so to put upon both Judges and Magistrates as strong a pressure as possible to get to the bottom of the matter before them."

**Reason of the Rule.**—The provisions of this section are not in accordance with English ideas. The reason why they have been introduced was given by Sir J. F. Stephen in his speech on the occasion of the Bill becoming law. He said: "I say that, throughout India, generally nothing like English system, under which the Bench and Bar act together and play their respective parts independently, does now exist, or can, for a length of time, be expected to exist . . . In England, cases are fully prepared for trial before they come into Court, so that, the Judge has nothing to do, but sit and weigh the evidence produced before him. In India, in an enormous mass of cases, this neither is nor can be so. It is absolutely necessary that the Judge should not only hear what is put before him by others, but that he should ascertain by his own inquiries how the facts actually stand. In order to do this, it will frequently be necessary for him to go into matters which are not themselves relevant to the matter in issue, but may lead to something that is, and it is in order to arm Judges with express authority to do this, that section 165, which has been so much objected to, has been framed."

**The power given by this section to the Court.**—(a). In the case of *Noorbux Kazi*, I. L. R. 6 Cal. 279, the Judge, on the examination-in-chief being finished, questioned almost all the witnesses at considerable length upon the very points to which he must have known that the cross-examination would certainly and properly be directed. The High Court condemned this procedure remarking: "It is not the province of the Court to examine the witnesses, unless the pleaders on either side have omitted to put some material question or questions; and the Court should, as a general rule, leave the witnesses to the pleaders to be dealt with, as laid down in sec. 138 of the Act. The Judge's power to put questions under sec. 165 is certainly not intended to be used in the manner, which we had had occasion to notice in the present case."

(b). Under this section, a Judge has the power of asking irrelevant questions to a witness, if he does so in order to obtain proof of relevant facts; but if he asks questions with a view to criminal proceedings being taken against the witness, the witness is not bound to answer them under sec. 179 of the Indian Penal Code—*Queen-Empress v. Hari Lakshman*, I. L. R. 10 Bom. 185.

**Power of Judge to send for witnesses not produced by Parties.**—As to, witnesses in civil cases, *vide* sec. 171 of the Civil Procedure

Code ; as to witnesses in criminal cases, *vide* sec. 549 of the Criminal Procedure Code.

**Duty of the Judge in the matter of the Admissibility of Evidence.**—It will be the duty of the Judge to ascertain, by a few questions put to each witness at the proper time, whether he is speaking of matters within his own knowledge, or merely of those which he has heard from others ; and if the former, what are his means of knowledge. The moment a witness commences giving evidence, which is inadmissible, he should be stopped by the Court. Sec. 298 of the Code of Criminal Procedure says that it is the duty of the Judge to prevent the production of inadmissible evidence whether it is or is not objected to by the parties. From the general tenor of the language of the Evidence Act, it would appear that it was the intention of the Legislature that a Civil Court should not, irrespective of objections made by parties, allow inadmissible evidence to go in.

**Right to cross-examine witness called by the Court under this section.**—(a). The provisions of this section “only forbid the cross examination without the leave of the Court of any witness upon any answer given in reply to a question asked by the Judge.” They apply rather to particular questions put to a witness already before the Court than to the whole examination of a witness called by the Court.—Field, 5th Ed., 667.

(b). If a witness, summoned on behalf of the prosecution, is not called by the party, but is called and examined by the Court under this section, the prisoner should be allowed to cross-examine—*Empress v. Grish Chunder Talukdar*, I. L. R. 5 Cal. 614.

(c). In *Reg. v. Sakharum Mukundji*, 11 Bom. H. C. R. 166, West J. remarked : “When the counsel for the prisoner has examined or declined to cross-examine a witness, and the Court afterwards, of its own motion, examined him, the witness cannot then, without the permission of the Court, be subjected to cross-examination. When, after the examination of a witness by the complainant and the defendant, the Court takes him in hand, he is put under special pressure, as the Judge is empowered to ask any question he pleases, in any form about any fact relevant or irrelevant ; and he is therefore, at the same time, placed under the special protection of the Court, which may, at its discretion, allow a party to cross-examine him ; but this cannot be asked for as a matter of right. The principle applies equally whether it is intended to direct the examination to the witness's statement of facts or to circumstances touching his credibility ; for any question meant to impair his credit tends (or is so designed) to get rid of the effect of all his answers, and of each of

them, just as much as one that may bring out an inconsistency or contradiction. It is then a cross-examination upon answers—upon every answer given to the Court, and is subject to the Court's control."

166. In cases tried by jury or with assessors, the jury or assessors may put any questions to the witnesses, through or by leave of the Judge, which the Judge himself might put and which he considers proper.

Power of jury  
or assessors to put  
questions.

## CHAPTER XI.

### OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE.

167. The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

No new trial  
for improper ad-  
mission or rejec-  
tion of evidence.

**Rule of English Law.**—"Where evidence has been offered by one party at the trial, and has been improperly rejected or admitted by the Judge after hearing the objections of the opposite party, a new trial, as a general rule, may be claimed on the ground that, in so rejecting or admitting the evidence, the Judge did not rule according to law. But still the Courts have not been in the habit of granting a new trial if, with the evidence rejected, a verdict for the party offering it would be clearly against the weight of evidence; or if, without the evidence received, there be enough to warrant the verdict, yet, unless in a very clear case, the Courts will not thus determine the effect of the improperly rejected evidence, but will direct a new trial."\* Where evidence has been improperly admitted or rejected

\* *Vide* Lush's Common Law Practice, 2nd Ed., 481.

at *Nisi Prius*, the Court will grant a new trial, unless it be clear *beyond all doubt*, that the error of the Judge could have had no possible effect upon the verdict, in which case they will not enable the defeated party to protract the litigation. It may further be stated, that the wrongful reception of evidence will not furnish less valuable ground for a new trial, although the jury accompany their verdict with a distinct and positive statement that they have arrived at it independently of the obnoxious evidence.\* The rule inunciated in this section seems to be less stringent.

**The Court before which such Objection is raised.**—The expression “the Court before which such objection is raised” includes the Reviewing or Appellate Court—*Imperatrix v. Pitambar Jina*, I. L. R. 2 Bom. 61.

**Application of the Section.**—This section applies to Criminal as well as to Civil Courts. *Vide* (1) *Imperatrix v. Pitambar Jina*, I. L. R. 2 Bom. 61 ; (2) *Queen v. Harribole Chundra Ghose*, I. L. R. 1 Cal. 207.

**Improper Admission of Evidence.—Remand.**—(a). In the case of *Womes Chunder Chatterji v. Chundi Charn Ray Chowdhary*, I. L. R. 7 Cal. 293, Garth C. J. said : “It seems to me, however, that there is great difficulty in applying the provisions of this section to the generality of cases which come before the High Court on second appeal, and the difficulty arises thus. On second appeal we have no power to deal with the sufficiency of the evidence ; we have only a right to entertain questions of law. And our duty being thus confined, it seems to me that when evidence has been wrongly admitted by the Court below, this Court has, generally speaking, no right to decide, whether the remaining evidence in the case, other than that which has been improperly admitted, is sufficient to warrant the finding of the Court below . . . . I think that the only case which we may with propriety dispose of under such circumstances without a remand are those, where, independently of the evidence improperly admitted, the Lower Court has apparently arrived at its conclusion upon other grounds. Where this appears pretty clear from the judgment, a remand is unnecessary, because then the error committed by the Lower Court has not affected the decision upon the merits.” *Vide Kunwar Mitrasar Singh v. Nand Lal*, 8 Moo. I. A. 199.

**Duty of Appellate Court when Evidence has been improperly received by Court of first instance.**—(a). The Appellate Court should throw aside the evidence which ought not to have been admitted, and then consider whether there still remains sufficient evidence to

\* *Vide Taylor*, 6th Ed., 1596.

support the decree or order. If, after all that is irrelevant has been thrown aside, there does not remain enough that is relevant to support it, the decision must be reversed—*Vide* (1) *Mohar Singh v. Ghariba*, 15 W. R. (P. C.) 8 ; (2) *Lalla Bansidhar v. The Government of Bengal*, 16 W. R. (P. C.) 11 ; (3) *Bammaranze v. Rangasami Mudali*, 6 Moo. I. A. 232.

(b). Where a copy of a deposition is improperly admitted, such admission is not ground of itself for a new trial, if, independently of the evidence so admitted, there is sufficient evidence to justify the decision—*Wooma Kant Bukshi v. Gunga Narain Chowdhry*, 20 W. R. 384.

(c). In the case of *Tota Ram v. Rekmani Balab*, 13 Moo. I. A. 83, their Lordships of the Privy Council said that they had not been in the habit of determining appeals upon the mere fact that certain evidence may have been improperly admitted ; that it had always been the rule of the Committee to do substantial justice between the parties, to take the record as it is sent over, and to see whether there is sufficient evidence on the whole record to justify the conclusion to which the Court below came.

**Objection taken in Appeal to a Document admitted in the Court of first instance.**—(a). If no objection is taken, in the Court of first instance, to the reception of a document in evidence, it is not within the province of the Appellate Court to raise or recognise it in appeal—*Chinnaji Govind Godbole v. Dinkor Dhondev Godbole*, I. L. R. 11 Bom. 320.

(b). An Appellate Court has no right to refuse to admit on technical grounds a document which has been received and read in the Court below without objection—*Akbar Ali v. Bhyea Lal Jha*, I. L. R. 6 Cal. 666.

**Reception of Unstamped or Insufficiently-stamped Document.**—

(a). The question of the admissibility of an insufficiently-stamped document once admitted as evidence by a Court can form no valid ground of appeal—*Khoob Lall v. Jungle Singh*, I. L. R. 3 Cal. 787. *Vide* also (1) *Deva Chand v. Hira Chand Kamaraj*, I. L. R. 13 Bom. (F. B.) 449 ; (2) *Girdhari Das v. Jagan Nath*, I. L. R. 3 All. 115 ; (3) *Afzal-un-nissa v. Tej Ban*, I. L. R. 1 All. 725 ; (4) I. L. R. 8 Mad. (F. B.) 664 ; (5) *Kastur Bhabani v. Appa*, I. L. R. 5 Bom. 621 ; (6) *Roy Luchmiput Singh Bahadoor v. Sheikh Moshuruff Ali*, 25 W. R. 80 ; (7) *Hur Chunder Ghose v. Wooma Soondari Dassi*, 23 W. R. 170 (8).

**Improper Exclusion of Evidence.**—The exclusion of evidence in the Lower Court is not sufficient ground for reversing that Court's

decree, unless the Appeal Court comes to the conclusion that the evidence refused, if it had been received, ought to have varied the decision—*C. R. DeSouza v. Pestanji Dhanjibhai*, I. L. R. 8 Bom. 408.

**Criminal Trials.—Improper Reception or Rejection of Evidence.**

—(a). In the case of *Queen-Empress v. Nand Ram*, I. L. R. 9 All. 609, copies of the depositions of certain witnesses, which had been recorded at a previous trial, were read out to the witnesses, who were then cross-examined by the prisoners, and no objection to this procedure was taken on the prisoners' behalf. The High Court held that although the procedure adopted by the Magistrate was irregular, the irregularity was cured by the provisions of section 537 of the Criminal Procedure Code and of section 167 of the Evidence Act, as it was not shown that there had been any failure of justice, or that the accused had been substantially prejudiced.

(b). Irregularity in the admission of the deposition of a medical witness, it not being shown that the prisoners had, thereby, been prejudiced, was held not to be objection which would justify an interference with the verdict—*In re Jhabu Mahton*, I. L. R. 8 Cal. 739.

(c). In *Queen-Empress v. O'Hara*, I. L. R. 17 Cal. 642, the Judge read to the jury certain statements made by two witnesses, when examined in the Lower Court as accused persons, and which had not been admitted in evidence. It was held that this was an error calculated to prejudice the prisoner.

(d). In *Imperatrix v. Pitambar Jina*, I. L. R. 61, it was held that the High Court had power to review the case and determine whether the rejection of evidence held to have been improperly admitted should have the effect of varying the result of the trial, so that the conviction should be reversed.

(e). *Vide Imperatrix v. Pandarinath*, I. L. R. 6 Bom. 34.

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**SCHEDULE.**  
**ENACTMENTS REPEALED.**

[See section 2].

Number and year.	Title.	Extent of repeal.
Stat. 26, Geo. III, cap. 57.	For the further regulation of the trial of persons accused of certain offences committed in the East Indies; for repealing so much of an Act, made in the twenty-fourth year of the reign of his present Majesty (intituled 'An Act for the better regulation and management of the affairs of the East India Company, and of the British possession in India, and for establishing a Court of Judicature for the more speedy and effectual trial of persons accused of offences committed in the East Indies, as requires the servants of the East India Company to deliver inventories of their estates and effects; for rendering the laws more effectual against persons unlawfully resorting to the East Indies; and for the more easy proof, in certain cases, of deeds and writings executed in Great Britain or India.	Section thirty-eight so far as it relates to Courts of Justice in the East Indies.
Stat. 14 & 15 Vic., cap. 99.	To amend the Law of Evidence	Section eleven, and so much of section nineteen as relates to British India.
Act XV of 1852 ...	To amend the Law of Evidence	So much as has not been heretofore repealed
Act XIX of 1853...	To amend the Law of Evidence in the Civil Courts of the East India Company in the Bengal Presidency.	Section nineteen.

Number and year.	Title.	Extent of repeal.
Act II of 1855 ...	For the further improvement of the Law of Evidence.	So much as has not been heretofore repealed.
Act XXV of 1861 ..	For simplifying the Procedure of the Courts of Criminal Judicature not established by Royal Charter.	Section two hundred and thirty-seven.
Act I of 1868 ...	The General Clauses Act, 1868	Sections seven and eight.

## APPENDIX.

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### A.

*Speech of the Hon'ble J. Fitz-James Stephen, Q. C., on presenting to the Supreme Council of India the report of the Select Committee on the Bill to define and amend the Law of Evidence, 31st March 1871.*

MY LORD,—I feel that I owe an apology to your Lordship and the Council, for requesting their attention to a second speech upon a purely legal subject, after the one which I delivered a week ago, upon the Limitation Act. On this occasion, however, I have to explain the position of a measure, perhaps as important as any that has been passed of late years by the Indian Legislature, inasmuch as, if it becomes law, it will affect the daily administration of both Civil and Criminal Procedure throughout the whole country. Moreover, the subject-matter to which the Bill refers, is one of deep and wide general interest, for a Law of Evidence properly constructed would be nothing less than an application of the practical experience acquired in Courts of Law, to the problem of inquiring into the truth as to controverted questions of fact.

This is the object which has been kept in view in framing the Bill which the Committee append to their report, and which I am now to describe in a general way to your Lordship and the Council.

I will state in the first place the history of the measure down to the present time. So far back as the year 1868, the Indian Law Commissioners drew a Draft Evidence Act, which was sent out to this country, and introduced and referred to a Select Committee, by my friend and predecessor Mr. Maine. The Bill was circulated for opinion to the Local Governments, and was pronounced by every legal authority to which it was submitted, to be unsuitable to the wants of

this country. In this view the Committee concur, for reasons which I need not state in detail on the present occasion. I may observe in general, however, that the principal reasons were, that the Bill was not sufficiently elementary; that it was in several respects incomplete, and that, if it became law, it would not supersede the necessity under which judicial officers in this country are at present placed, of acquainting themselves by means of English hand-books with the English law upon this subject. The Commissioners' draft, indeed, would hardly be intelligible to a person who did not enter upon the study of it, with a considerable knowledge of the English law. Under these circumstances, a new Draft was framed, which we now propose to print and circulate, and on which I hope to receive the opinions of the Local Governments and High Courts, in the course of the summer, say, by next September, so that their criticisms may be deliberately weighed, and the measure may be finally disposed of, by this time next year.

The report of the Committee explains very fully the scheme of the Bill, which, of course, is of considerable, though not, I hope, of unwieldy, length, and enters fully into the reasons which have led us to adopt its leading provisions. I will not weary the Council by going into all these questions on the present occasion. I will confine myself to saying that I trust that those who will have to criticise the Bill will begin by studying the report, which has been drawn up with great care, and which, as well as the Bill itself, forms a connected and systematic whole. The general object kept in view in framing the Bill has been to produce something from which a student might derive a clear, comprehensive, and distinct knowledge of the subject, without unnecessary labour, but not, of course, without that degree of careful and sustained attention which is necessary in order to master any important and intricate matter. It is by this standard that the Committee in general, and I in particular, as the member in charge of the Bill, desire that it may be tried.

With this reference to the Bill and the report of the Committee, I proceed to discuss the general questions connected with the subject, and to mention a few of the leading features of the measure.

I suppose that I may assume, as generally admitted, the necessity which exists for legislation on the subject of evidence in British India. It would be exceedingly difficult to say precisely what, at the present moment, the law upon the subject is. To some extent—it is far from being clear to what extent—and in some parts of the country—though questions might be raised as to the particular parts of the country—the English Law of Evidence appears to be in force in British India. Whatever may be the theory, it both is and will continue to be so in practice; for, if the English Law of Evidence has not been introduced into this country, English lawyers and *quasi-lawyers* have, and the Courts have been directed to decide according to the law of justice, equity, and good conscience. Practically speaking, these attractive words mean little more than an imperfect understanding of imperfect collections, of not very recent editions of English text-books. It is difficult to imagine anything much less satisfactory than such a state of the law as this. A good deal may be said for an elaborate legal system, well understood and strictly administered. A good deal may be said for unaided mother-wit and natural shrewdness; but a half-and-half system, in which a vast body of half-understood law, destitute of arrangement and of uncertain authority, maintains a dead-alive existence, is a state of things which it is by no means easy to praise.

Legislation being thus necessary, in what direction is legislation to proceed? A gentleman, for whose opinion upon all subjects connected with Indian law and legislation I, in common with most other people, have a profound respect, said to me the other day in discussing this subject:—‘My Evidence Bill would be a very short one. It would consist of one rule, to this effect—All rules of evidence are hereby

abolished.' I believe that the opinion thus vigorously expressed, is really held by a large number of persons who would not avow it so plainly. There is, in short, in the lay world, including in the expression the majority of Indian civilians, an impression that rules of evidence are technicalities invented by lawyers principally, for what Bentham called, fee-gathering purposes, and no real value in the investigation of truth. I cannot admit that this impression is in any degree correct. I believe that rules of evidence are of very great value in all inquiries into matters of fact, and in particular, in inquiries for judicial purposes; and that it is practically impossible to investigate difficult subjects without regard to them.

It is worth while to illustrate this point a little, because the necessity for rules of evidence rests upon it; but strong proof of it is to be found in the fact, that in all ages and countries there have been rules of evidence. In rude times and amongst primitive people, the task of arriving at the truth as to matters of fact, was regarded as so hopelessly difficult, that rude arbitrary substitutes for any sort of rational procedure were provided, in the shape of ordeals and judicial combats. When people began to obtain glimpses of the true methods of investigation, they seem to have considered as almost supernatural skill, what in our days would fall within the scope of average police officers or attorneys' clerks. The delighted wonder which was displayed by the Jews, according to the apocryphal story of Susannah and the Elders, at what a friend of mine used to call 'that very feeble cross-examination of Daniel's about the trees,' is a good instance of this. At a later period, arbitrary rules of evidence began to be formed. Such a fact must be proved by two eye-witnesses; such another by four; such another by seven. To say nothing of European systems, in which such rules were in force, the Hedaya is full of them. These rules were never introduced in their full force into England, but the system which was adopted, or rather which grew up by degrees, was of a very mixed and exceedingly singular character. Part

of it consisted of rules declaring large classes of witnesses to be incompetent. Part was intimately connected with the English system of special pleading, which was so contrived, as to define with extreme precision, the facts upon which the parties differed, or were, as the phrase goes, at issue. Part was the result of the practical experience of the Courts, and these rules were by far the most valuable portion, in my opinion, of the English Law of Evidence. Most of the other rules have, indeed, been cut away by legislation, and those which still remain, may fairly be taken to be the nett result of English judicial experience in modern times. In the most general terms, these rules are—

- (1) that evidence must be confined to the issue ;
- (2) that hearsay is no evidence ;
- (3) that the best evidence must be given ;
- (4) rules as to confession and admissions ;
- (5) rules as to documentary evidence.

I have two general remarks to make upon them.

The first is, that they are sound in substance and eminently useful in practice, and that, when properly understood, they are calculated to afford invaluable assistance to all who have to take part in the administration of justice.

The second is, that I believe that no body of rules upon any important subject, were ever expressed so loosely, in such an intricate manner, or at such intolerable length.

It is necessary to prove the first of these propositions, in order to justify the recommendation of the Committee that the substance of the rules in questions, should be introduced in the form of express law into this country. It is necessary to prove the second proposition, in order to justify the attempt made in the Bill to reduce the rules to order and system.

First, then, as to the proposition that the rules in question are substantially sound, and do far more good than harm, even in their present confused condition. The proof of this

is, I think, to be found in a comparison between the proceedings of English Courts of Justice, and those of countries which have no such rules, and between the proceedings of English Courts in which these rules are, and those in which they are not, understood and acted upon. As a preliminary remark, I think, I ought to observe that the knowledge of these rules possessed by English lawyers, is derived far more from daily practice in the Courts, than from theoretical study. Many English lawyers know by habit, almost instinctively, whether this or that (to use the common phrase) is or is not evidence, although they have hardly given the theory of the matter a thought. The value of these rules should accordingly be tested by their practical results, and not by the theories on which they have been justified. Those theories are clumsy, intricate, ambiguous, and in many instances absurd, and are mere after-thoughts suggested by the eminently sagacious practice which they were intended to justify and explain. What then is the practical effect of these rules? I may perhaps be permitted to answer this by referring to a book which I published in 1863 on the Criminal Law of England, which contains, amongst other things, an analysis of several celebrated trials, English and French. One object of that analysis was to contrast the effect of the presence and absence of rules of evidence; and I think that any one who would take the trouble to compare those trials together carefully, would agree with me in the conclusion, that the practical effect of the English rules of evidence in those cases, was to shorten the proceedings enormously, and at the same time to consolidate and strengthen them, keeping out nothing that a reasonable person would have wished to have before him as materials for his judgment. The French system, on the other hand, which dispenses with all rules of evidence, got, at least in those cases, no other result from the want of them, than floods of irrelevant gossip and collateral questions enough to confuse and bewilder the strongest head.

Again, compare the proceeding of an ordinary Court of criminal justice with the proceedings of a Court-martial,



in which the rules of evidence are far less strictly enforced, and less clearly understood. An ordinary Criminal Court never gets very far from the point, but a Court-martial continually wanders into questions far remote from those which it was assembled to try. Nothing, for instance, is more common than to see the prosecutor change places, as it were, with the prisoner, or to find collateral issues pursued till the Court finds itself engaged in determining, not whether A was guilty of a military offence, but whether Z told a falsehood on some irrelevant subject. In a case which I well recollect, B testified against A. B being cross-examined to his credit, stated a fact not otherwise relevant to the inquiry. Z denied the fact which B affirmed, and made further statements which were contradicted by intermediate letters of the alphabet. No Judge can possibly be expected, by the mere light of nature, to know how to set limits to the inquiries in which he is engaged; yet if he does not, an incalculable waste of time and energy, and a great weakening of the authority of his Court, is sure to follow. Active and zealous advocates, who have no rules of evidence to restrain their zeal, would have it in their power to pervert the administration of justice to the basest purposes, and to inflict immense injury on every class connected with it, directly or remotely. Trials might, and often would, in such hands be made the excuse for tearing open old quarrels, reviving questions laid at rest, and giving fresh animus to scandals long since exploded; and the main question would frequently be lost sight of, in a cloud of irritating and useless collateral issues. I may be excused for referring to my own experience at the English Bar in illustration of this. Appeals against orders of affiliation, used invariably to produce an amount of perjury and counter-perjury which I should think it would be difficult to exceed in any country. In certain parts of the country, it was a point of honour for the friends of the putative father and of the mother, respectively, to 'go to sessions to swear for him, or her,' as they used to say. No one who did not take part in such cases

could imagine the strange ramifications of falsehood and contradiction, into which a hotly-contested case of this kind would spread, or the number of imputations thrown on the honesty and chastity of the different witnesses, male and female. If it had not been for the rules of evidence, the reputations of half the population of the village would have been torn in pieces. The rules of evidence kept matters to a point, and so minimized the evil; but the parties, the witnesses, and the attornies, all appeared to me to be, one more anxious than another, to fight the matter out till the very last rag of character had been stripped off the back of every man, woman, and child, whose name was in any way brought into the discussion. The French Courts display this evil, in an aggravated form. In the work to which I have already referred, will be found an account of the trial of a monk named Leotade for murder. If disposed of under the English rules of evidence, it could hardly have taken more than a day or two at the most. In the French Court, it lasted for, I think, about three weeks, and branched out into all sorts of subjects. One witness, in particular, was discovered to have seduced a girl seven years before, and letters from her to him were read, to throw light on his character. He naturally wished to give his own account of the transaction, but was stopped on the ground that a line must be drawn somewhere, and that the Court chose to draw it between the point at which an irrelevant slur had been thrown on his character, and the point at which, had he been permitted to do so, he might have given an equally irrelevant explanation.

It is not, however, merely for the purpose of confining judicial proceedings within reasonable limits, that rules of evidence are useful. They are also of pre-eminent importance for the purpose of protecting and guiding the Judge in the discharge of his duty. There is a sense in which it may be said with perfect truth, that even legislative power is unequal to the task of abolishing rules of evidence. No doubt, it is competent to the Legislature to provide that no

rules of evidence shall have the force of law ; but unless they expressly forbid all Courts and Judges to act upon any rules at all, or to listen to any arguments as to the manner in which they shall exercise the discretion with which they are invested (propositions too absurd to discuss), the Judges infallibly will hear, and will be guided by, arguments upon the subject, and these arguments will be drawn from the practice of English Courts. Moreover, the Courts of Appeal will exercise their own discretion in the matter, and thus, by degrees, the system would grow up again in the most cumbrous, chaotic, and inconvenient of all conceivable shapes. The plain truth is, that there is only one possible way of getting rid of the law of evidence, and that is by getting rid of the administration of justice by law, and returning to the system of mere personal discretion.

It may be that some persons would like this policy, but I suppose it is one which I need not discuss.

So far, I have considered the rules of evidence merely as they conduce to the important practical objects of keeping proceedings to the point, and of protecting and supporting the Judges. I must now say a few words on their value, as furnishing the Judge with solid tests of truth. I admit that their value in this respect is often exaggerated and misconceived ; but I think that, when the matter is fairly stated, it will be found that they have a real, though it may be described as a negative, value for this purpose. There are two great problems on which the rules of evidence throw no light at all, and on which they are not intended to throw any light ; and it must be admitted that these problems are by far the most important of any, which a Judge has to solve. No rule of evidence that ever was framed, will assist a Judge in the very smallest degree in determining the master-question of the whole subject—whether, and how far, he ought to believe what the witnesses say ? Again, rules of evidence are not, and do not profess to be, rules of logic. They throw no light at all, on a further question of equal importance to the one just stated. What inference ought the Judge to draw

from the facts in which, after considering the statements made to him, he believes? In every judicial proceeding whatever, these two questions—Is this true? and, if it is true, what then?—ought to be constantly present to the mind of the Judge; and it must be admitted, both that the rules of evidence do not throw the smallest portion of light upon them, and that persons who are absolutely ignorant of those rules, may give a much better answer to each of these questions, than men to whom every rule of evidence is perfectly familiar. I think, that a more or less distinct perception of this, coupled with impatience of the exaggerated pretensions which have sometimes been made on behalf of the rules of evidence, are the principal reasons for the distrust and dislike, with which they are at times regarded. This dislike, I think, is merely a particular instance of the vulgar error, which in so many cases leads people to depreciate art in comparison with nature; as if there were an opposition between the two, and as if art in all cases did not pre-suppose and depend upon nature. The best shoes in the world will not make a man walk, nor will the best glasses make him see; and in just the same way, the best rules of evidence will not supply the place of natural sagacity, or of a taste for, and training in logic; but it no more follows that rules of evidence are useless as guides to truth, than that shoes or glasses are useless as assistances to the feet and to the eyes. The real use of rules of evidence in ascertaining the truth, consists in the fact that they supply tests, warranted by very long and varied experience, as to two great points, the relevancy of facts to the question to be decided by the Court, and the sort of evidence by which particular facts ought to be proved. They may in the broadest and most popular form be stated thus—If you want to arrive at the truth as to any matter of fact of serious importance, observe the following maxims:—

First, if your belief in the principal fact which you wish to ascertain is to rest, after all, upon an inference from other facts, let those facts, at all events, be closely connected

with the principal fact in some one of certain specific modes. Secondly, never believe in any fact whatever, whether it is the fact which you principally wish to determine, or whether it is a fact from which you propose to infer the existence of the principal fact, until you have before you the best evidence that is to be had; that is to say, if the fact is a thing done, have before you some one who saw it done with his own eyes: if it was a thing said, have before you some one who heard it said with his own ears: if it was a written paper, have the paper before you and read it for yourself.

This—exceptions, qualifications, and explanations apart—is the true essence of the rules of evidence, and I think that no one will deny, either that these rules are in themselves eminently wise, or that they are by no means so obvious and self-evident that the mere unassisted natural sagacity of judicial officers of every grade can be trusted to grasp their full meaning, and to apply them to the practical questions which arise in the administration of justice, with no assistance from express law. I do not wish to exaggerate, but I must add, that I attach some moral value to these rules. If they are firmly grasped by Courts of Justice, and rigidly insisted upon in all practical matters which come before the Courts, they will gradually work their way amongst the people at large, and furnish them with tests by which to distinguish between credulity and rational belief, upon a great variety of matters, and this may be of vast importance. I ought to add that the good which they are calculated to effect, can be obtained only by erecting them into laws and rigorously enforcing them. When this is done, I feel confident that experience will be continually adding to the proof of their value.

So far, I have tried to prove the proposition that the English rules of evidence are of real solid value, and that they are not a mere collection of arbitrary subtleties which shackle, instead of guiding, natural sagacity. I pass now to the next proposition, which is, that these rules are expressed in a form so confused, intricate, and lengthy, that it is

hardly possible for any one to learn their true meaning otherwise than by practice,—an inconvenience which may be altogether avoided by a careful and systematic distribution. For the proof of this proposition, if indeed it is disputed, I can only refer in general to the English text-books on the subject. They form a mass of confusion which no one can understand until, by the aid of long practice, he learns the intention of the different rules, of which they heap together innumerable and often incoherent illustrations. I am far from wishing to impute this as a fault to the industrious, and in many cases distinguished, authors of these compilations. They, like all other hand-books, are intended for immediate practical purposes, and are mere collections of enormous masses of isolated rulings, generally relating to some very minute point. It was necessary, therefore, that they should be arranged, rather with reference to vague catch-words, with which the ears of lawyers are familiar, than with reference to theoretical principles, which it has never been worth any lawyer's while to investigate.

The condition of the law of evidence, as well as the condition of many other branches of the law of England, affords continual illustrations of the extraordinary intricacy and difficulty which arises from the combination of the very greatest practical sagacity with an absence of sound theory, or, what is still worse, with the presence of unsound theory. No one who has not seen it, could possibly imagine how obscure the meaning of a clever man may become when he is forced to squeeze it into the terms of a theory, which does not fit it, and is not true. I will give one or two illustrations of my meaning. The expression 'hearsay is no evidence' early obtained considerable currency in the English Courts. It is referred to in the instructions given to Algernon Sidney for the management of his defence by an eminent barrister, about 200 years ago. In a general way, its meaning is clear enough, and, what is more, is true; but, when considered as the full expression of a general truth, from which rules can be deduced in particular cases, it is inaccurate, faulty,

and obscure to the last degree. The objections to it are, that both 'hearsay' and 'evidence' are words of the most uncertain kind, each of which may mean several different things. For instance, hearsay may mean what you have heard a man say, and this is its most obvious meaning; but it is difficult to imagine a grosser absurdity than the assertion that no one is ever to prove, in a judicial proceeding, any thing said by any other person. 'Hearsay,' again, may be taken to mean that which a person believes, not because he perceived it with his own organs of perception, but on the authority of another; but this is not the natural sense of the word, and it is almost impossible in practice to divest a word of its natural meaning.

The word 'evidence' is also exceedingly ambiguous. It may mean, that which a witness says in Court. It may mean, the facts to which he testifies, regarded as a groundwork for further inference. Notwithstanding this double ambiguity the phrase 'hearsay is no evidence,' being emphatic and easy to recollect, stuck in the ears and in the minds of lawyers, and has been taken by many text-writers as the principle on which their statement of the most important branch of the law of evidence is to be arranged. They accordingly took to describing as hearsay, every fact of which evidence was by law excluded; in short, they turned 'hearsay is no evidence' into 'that which is not evidence is hearsay.' They did not, however, do this expressly. They did it by describing as exceptions to the rule excluding hearsay, all cases in which evidence was admitted of anything, which would have been excluded, but for such exceptions. This is so intricate a statement that I can hardly expect the Council to follow me, but I will give an illustration of what I mean. The question is, whether a piece of land belongs to A or B. A says that it belongs to him, because his father C bought it from D, who bought it from E, and he produces the deeds by which E conveyed the land to D, and D conveyed it to C. Now, as D and E are not parties to the suit between A and B, and as A cannot of his own knowledge know anything of the

transaction between them, English text-writers call the deed between D and E 'hearsay' and according to Mr. Pitt Taylor, the rule which permits such deeds to be given in evidence is the third exception to the rule which excludes hearsay. One of the Judges, if I am not mistaken, called such evidence 'written hearsay,' and so indifferent are English lawyers in general, to the abuse of language for the sake of momentary convenience, that it probably never struck him, that this was a contradiction in terms. I think, however, that it is hard to expect people to understand, bear in mind, and follow out in all its ramifications a system, which employs language in such a peculiar manner, as to call ancient deeds 'written hearsay.' To talk of hearing a document, is like talking of seeing a sound.

I now turn to the ambiguity of the word 'evidence,' to which I have already referred. As I have just said, 'evidence' sometimes means a fact which suggests an inference. For instance, it is common to say,—'Recent possession of stolen goods is evidence of theft'; that is, the fact of such possession suggests the inference of theft. At other times, and I think more frequently, 'evidence' means what a witness actually says in Court, or that which he produces. For instance, we say 'the evidence which he gave was true.' I might occupy, I will not say the attention, but the time of your Lordship and the Council for hours, if I were to attempt to describe the amount of confusion and obscurity which the neglect of this simple and obvious distinction has thrown over the whole subject. I will content myself with observing that it produces the effect of giving a double meaning to every expression into which the word 'evidence' is introduced. 'Circumstantial evidence,' 'hearsay evidence,' 'direct evidence,' 'primary evidence,' 'best evidence,' have each two sets of meanings, and the result is, that it is almost impossible to arrive at a clear and comprehensive knowledge of the whole subject, or to see how its various parts are related to each other, without an amount of study, thought, and practical acquaintance with the actual working of the rules of evidence,



which few people are in a position to bestow upon the subject.

I may appear to be detaining the Council unduly upon merely verbal questions, but it is a common fault to under-rate the importance of accurate language, particularly in regard to the fundamental terms of any particular branch of knowledge. In regard to law, I have not the least doubt that a very large proportion of the intricacy and difficulty which attach to it, is due to the fact, that proper pains have never been bestowed on the definition of its fundamental terms. What could be made of Euclid, if we were not quite sure of our meaning when we spoke of a point, a line, a circle, parallels, and perpendiculars? Such a defect would render geometry impossible, and the defect which makes large parts of the law almost unintelligible, and beyond all measure cumbrous and unwieldy, is precisely analogous to it in principle. I believe that, if its fundamental terms were defined as clearly as the term 'law' was defined by the late Mr. Austin, the study of law would become comparatively easy, and in many cases attractive for its own sake; that its bulk might be diminished to a degree of which people in general have hardly any conception; that the expense of its administration might be greatly diminished and that comparative certainty might do away with a very large amount of needless and harassing litigation.

I shall now proceed to describe, shortly, the principles on which the Draft Bill of the Committee has been framed. In the first place, we thought it necessary to fix the sense in which the fundamental terms of the subject should be understood, and for that purpose we define 'fact,' 'evidence,' 'proof,' 'proved,' and some other words as to which I will content myself with a reference to the report. It seemed to us that the remainder of the subject would fall under the following general heads:—

- 1.—The relevancy of facts to the issues to be proved.
- 2.—The proof of facts, according to their nature by oral, documentary, or material evidence.

3.—The production of evidence in Court.

4.—The duties of the Court, and the effect of the mistaken admission or rejection of evidence.

These heads would, we think, be found to embrace, and to arrange in their natural order, all the subjects treated of by English text-writers and Judges, under the general head of the Law of Evidence. I will say a few words on their relation to each other, and on each of them in turn.

The main feature of the Bill, consists in the distinction drawn by it between the relevancy of facts, and the mode of proving relevant facts. The neglect of this distinction by English text-writers, no doubt, arises from the ambiguity of the word 'evidence,' to which I have already referred, and is the main cause of the extreme difficulty of understanding the English Law of Evidence systematically. I will shortly illustrate my meaning. A says, 'Z committed murder.' First of all, this is a fact—something which could be directly perceived by the sense of hearing and distinctly remembered afterwards. Now, whether this fact is or is not relevant in a particular case, depends upon a variety of circumstances. If the question is, whether A was guilty of defaming Z by accusing him of murder? or whether Z had a motive for assaulting A, because A said that he had committed murder? or if Z is accused of murder, and the object is to show that, when A charged him with it, he behaved as if he were guilty, and in many other instances which might be put, the fact that A spoke those words is clearly relevant. But if the question is, whether Z actually did commit murder, the fact that A thought so or said so, generally speaking, is not relevant. Supposing, however, that the fact is relevant, it is obvious that the words themselves ought to be satisfactorily proved, and the rule of English law—and we think it is a wise rule—is that they must be proved by the assertion of some witness, that he heard them said with his own ears. Here then, we have two questions:—(1) need the Court decide whether these words were spoken?

(2) if it need, how is it to be satisfied of the fact? English text-writers throw together these two classes of rules under the head of hearsay. They lay down the general rule that hearsay is no evidence, meaning by it that certain classes of facts called hearsay are to be treated as irrelevant to the determination of particular questions, and it is necessary to look through a long list of exceptions to the rule, in order to see whether, in a particular case, A's statement may or may not be proved. If you find that it can be proved, the question is, how can it be proved? and you propose to prove it by a witness who says that B told him that he heard A say so. Again, you are told, 'hearsay is no evidence'; but this time the expression means, not that the fact is irrelevant, but that the testimony by which it is proposed to prove the fact is improper. One extreme inconvenience of this is, that the most important part of the English Law of Evidence is thrown into the most intricate and inconvenient of all possible forms, that of a wide negative, of uncertain meaning, qualified by a long string of intricate exceptions.

No one who has not gone through the process of learning the law by mere rule-of-thumb practice, can imagine the degree of needless obscurity and difficulty upon this point, of the existence of which he becomes gradually conscious. It would be perfectly fair to say to almost any English text-writer, 'you tell me, at enormous length, what is not evidence; but you nowhere tell me what is evidence.'

I hope that we have been able to avoid this, and that the second chapter of the Bill will be found to state specifically, and in a positive form, what sorts of facts are relevant, as being sufficiently connected with the facts in issue to afford grounds for an inference as to their existence or non-existence. I will not weary the Council by specifying those rules, and I will content myself by referring to the Bill and the report. But I may shortly illustrate them by reference to a passage from a modern historian, which will relieve the dulness of a very technical speech. The

passage to which I refer is a short summary, by Mr. Froude, of the grounds on which he believes that Mary Queen of Scots murdered her husband.

As Mr. Froude is not a lawyer, he certainly wrote, what I am about to read, without reference to rules of evidence. I think the fact that he did, in fact, unconsciously observe them, illustrates very strongly the truth of my assertion, that they are nothing more than the result of experience and practical sagacity, thrown into a categorical shape. I need hardly say that I use the passage merely as an illustration, and without any notion of adopting Mr. Froude's opinions, or asserting the truth of his facts. I am concerned merely with their relevance.

'She (Mary) was known to have been weary of her husband, and anxious to get rid of him.'

(By our draft, Sec. 11. Facts which show motive for any facts in issue, are relevant).

'The difficulty and the means of disposing of him had been discussed in her presence, and she had herself suggested to Sir James Balfour to kill him.'

(Sec. 11. Facts which show preparation for a fact in issue, are relevant).

'She brought him to the house where he was destroyed; she was with him two hours before his death.'

(Sec. 9. Facts so connected with the facts in issue as to form part of the same transaction, are relevant).

'And afterwards threw every difficulty in the way of any examination into the circumstances of his end.'

(Sec. 11. Subsequent conduct, influenced by any fact in issue, is relevant).

'The Earl of Bothwell was publicly accused of the murder.'

(Sec. 11. Facts which explain or introduce relevant facts, are relevant).

'She kept him close at her side; she would not allow him to be arrested; she went openly to Seton with him,

before her widowhood was a fortnight old. When at last, unwillingly, she consented to his trial, Edinburgh was occupied by his retainers. He presented himself at the Tolbooth surrounded by the Royal Guard, and the charge fell to the ground, because the Crown did not prosecute, and the Earl of Lennox had been prevented from appearing.'

A few weeks later she married Bothwell, though he had a wife already, and when her subjects rose in arms against her, and took her prisoner, she refused to allow herself to be divorced from him.

(Sec. 11. Subsequent conduct, influenced by any fact in issue, and facts showing motive are relevant).

A large part of the evidence consisted of certain letters which the Queen was said to have written. Mr. Froude, in passages which I need not read, alleges facts which go to show that she tried to prevent the production, and to secure the destruction of these letters.

(Sec. 11, Illustration (*h*). The facts that either before, or at the time of, or after the alleged crime, A provided evidence which would tend to give the facts in issue, an appearance favourable to himself, or that he destroyed or concealed evidence, &c., are relevant).

Finally, Mr. Froude observes:—'In her own correspondence, though she denies the crime, there is nowhere the clear ring of innocence which makes its weight felt, even when the evidence is weak, which supports the words.'

(Sec. 25. An admission is a statement, oral or documentary, which suggests any inference as to any relevant fact, and which is made by parties to the proceeding. Sec. 26. Admissions are relevant facts only as against the person who denies the inference which they suggest. They are not relevant on behalf of the person who asserts the truth of such inference. The letters would be evidence under these sections, and Mr. Froude's remark is in nature of a criticism on them by a prosecuting Counsel).

In English text-books, so far as my experience goes, these rules and others of the same sort, are nowhere presented in a compact substantive form. They come in for the most part, as exceptions to the rule that evidence must be confined to the points in issue. In fact, they can be learned only by the practice of the Courts, though they are as rational and easy as any rules need be, if they are properly stated.

From the rules which state what facts may be proved, we pass to those which prescribe the manner in which a relevant fact must be proved. Passing over technical matters—such as the law relating to judicial notice, questions relating to public documents, and the like—these rules may be said to be three in number, though, of course, numerous supplementary rules are required to adapt them to practice. They are these—

1. If a fact is proved by oral evidence, the oral evidence must be direct; that is to say, things seen must be deposed to by some one who says he saw them with his own eyes. Things heard by some one who says he heard them with his own ears.

2. Original documents must be produced or accounted for, before any other evidence can be given of their contents.

3. When a contract has been reduced to writing, it must not be varied by oral evidence.

These rules, as I have said, are subject to certain exceptions, and require certain practical adjustments; but I do not think that any one who has had practical experience of the working of courts of justice will deny their substantial soundness, or indeed the absolute practical necessity for enforcing them.

Passing over these matters which are explained at length in the Bill and report, I come to two points to which the Committee attach the greatest importance as having peculiar reference to the administration of justice in India. The first of these rules refers to the part taken by the Judge

in the examination of witnesses; the second, to the effect of the improper admission or rejection of evidence upon the proceeding in case of appeal.

That part of the English Law of Evidence which relates to the manner in which witnesses are to be examined, assumes the existence of a well-educated Bar, co-operating with the Judge and relieving him practically of every other duty than that of deciding questions which may arise between them. I need hardly say that this state of things does not exist in India, and that it would be a great mistake to legislate as if it did. In a great number of cases—probably the vast numerical majority—the Judge has to conduct the whole trial himself. In all cases he has to represent the interests of the public much more distinctly than in England. In many cases he has to get at the truth, or as near to it as he can, by the aid of collateral inquiries, which may incidentally lead to something relevant; and it is most unlikely that he should ever wish to push an inquiry needlessly, or to go into matters not really connected with it. We have accordingly thought it right to arm Judges with a general power to ask any questions, upon any facts, of any witnesses, at any stage of the proceedings, irrespectively of the rules of evidence binding on the parties and their agents, and we have inserted in the Bill a distinct declaration, that it is the duty of the Judge, in criminal cases, not merely to listen to the evidence put before him, but to inquire to the utmost into the truth of the matter. We do not think that the English theories, that the public have no interest in arriving at the truth, and that even criminal proceedings ought to be regarded mainly in the light of private questions between the prosecutor and the prisoner, are at all suited to India, if indeed they are the result of anything better than carelessness and apathy in England.

With respect to the question of appeals, we have drawn a series of provisions, the object of which is to prevent mere mistakes in procedure from destroying the value of work properly done, as far as it goes. We have gone through the

various cases in which, as appears to us, the question of the improper admission or rejection or omission of evidence can arise; and have provided that, whenever any Appellate Court discovers the occurrence of any mistake, it shall not reverse the decision of the inferior Court, but shall either strike out what is redundant, or supply what is defective, as the case may be, and give judgment accordingly.

I have addressed your Lordship and the Council at great length, but not, I think, at greater length than the importance of the matter requires. I have only to add, that I propose to proceed with the Bill when the Government returns to Calcutta, and that I hope before that time, to receive the criticisms of the Local Governments upon the measure.

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## B.

*Speech of the Hon'ble Fitz-James Stephen delivered on the 12th March 1872, when moving that the Bill should be taken into consideration.*

MY LORD,—Just a year ago, in submitting the report of the Committee to the Council, I explained at very considerable length the general design and scope of the Bill which they proposed, and which is now before the Council for its final decision. I need not revert to what I then said upon the general principles of the subject. My best course, I think, will be to inform the Council of what has taken place in relation to the Bill since I last addressed them on the subject.

After a very full and careful reconsideration of its various details, the Bill was published in the Gazette and forwarded to the Local Governments for opinion. It was carefully reconsidered in Committee, after the return of the Government to Calcutta. It was published in the Gazette upwards of a month ago, with a report giving an account of the various alterations which had been made in it; and it is now finally submitted for the consideration of the



Council. The Committee has fully considered all the papers with which it was favoured ; but, with one or two exceptions, I cannot say that it has received any very considerable assistance from its critics. The Bengal Government made some important observations, and so did the Madras Government, which favoured us with two peculiarly valuable papers ; one by the then Advocate-General, Mr. Norton, and the other in the form of a letter by the Government itself, which had obviously been prepared with the advice and assistance of a very able professional lawyer. We have received no public expression of opinion from any one of the High Courts, except the High Court of Bombay, which approved generally of the Bill, but took exception to two of its provisions on minor points. The High Court of Calcutta announced its intention to say nothing at all on the matter. The High Courts of Madras and Allahabad have, as a fact, said nothing ; and as the Bill has been before them for many months, I presume that they do not intend to do so. I have, however, the satisfaction of being able to say that most of the Barrister Judges of the High Courts, and three out of the four Chief Justices, have informed me that they approve generally of the Bill, and regard it as an important improvement on the existing state of things. The Local Governments, I think, are unanimous in regarding the measure as one which is much needed, and which is so far suited to its purpose as to be both intelligible to persons not legally trained, and complete in essential respects.

Upon this point, I would specially refer to the valuable papers already referred to, which have been received from Madras. It is impossible, in reading them, not to see that their authors do not like the Bill. They find every fault they can with it, sometimes coming to very minute criticism. I do not in the least complain of this. I only wish the Bill had been criticised more fully in the same spirit, and I readily admit that the critics in question have pointed out many defects which have been, I think, removed.

I am entitled to say that such other defects as may still be latent in it have escaped the detection of at least two highly competent, and by no means favourable critics, who have given the matter careful consideration. Upon some of these criticisms, I will make a few remarks as I go on. I refer to them now for the sake of showing the importance of the opinions which I am about to read.

The letter of the Madras Government says—

“It is both advisable and possible so to codify the Law of Evidence as to present within the limits of a single enactment a treatise upon that law practically sufficient for ordinary purposes,”

and it then adds—

“The Draft Bill in its scheme and general arrangement appears to furnish an adequate outline of such a Code ;”

but it is observed that the Bill ‘in its present state is far from complete.’

Mr. Norton expresses the same opinion at greater length, and each of these authorities agrees in the statement that the Bill is only a skeleton, which will have to be completed by a great number of judicial decisions.

Mr. Norton criticises the Bill, section by section, and in order to show how fully he has done so, he observes :—

“I have, however, compared it, section by section, with Taylor, Roscoe, Best, and other text-writers ; with the Civil and Criminal Procedure Codes so far as they apply to the subject of evidence ; with some of the existing Acts which regulate judicial evidence, and such judicial decisions as I have access to, illustrating the principles which at present are generally supposed by the Profession to obtain in the Courts of India.”

He could hardly, I think, have submitted it to a more searching test. Further on, he observes :—

“The process by which this Bill has been, in the main, built up, appears to me to have been by following Mr. Pitt Taylor’s work on evidence, and arbitrarily selecting certain sections or portions of sections.”

He then criticises the Bill in detail, and concludes by saying—

"Such are the observations that have occurred to me in the most careful study I can give this Bill ; and I think that, with some omissions, a little re-arrangement here and there, and considerable extension and enlargement, it promises to prove a great step in advance and improvement in the present uncodified Law of Evidence, and likely to afford very valuable aid and facilities to the Mofussil Judges, and all concerned in the practice of the law in the Mofussil."

The general result of these criticisms is, that the Bill is good as far as it goes, but is very incomplete, and is composed, of scraps of *Taylor on Evidence*, 'arbitrarily,' and much too sparingly, selected. I think I owe to the Council and to the public some observations on this matter. I assert that they do the Bill an injustice ; that it is very much more complete than its critics allow it to be ; and that their own writings prove it. I will not do Mr. Norton the injustice of supposing that he has intentionally kept back anything of importance which has occurred to him in the Bill. I am therefore entitled to assume that his paper which contains 103 paragraphs and extends over 14 folio pages, refers to all the defects and omissions which his careful study of the subject has brought to his notice. Passing over criticisms of detail, many of which are no doubt just and have been adopted, I find that the only sins of omission with which he charges the Bill are the following :—

1.—Its provisions as to the effect of judgments are 'meagre.'

2.—It does not deal fully enough with the subject of presumptions.

He also suggests slight additions to, or enlargements upon four sections of very subordinate importance, which I will not trouble the Council by referring to.

The letter from the Madras Government, which describes the Bill as 'far from complete,' specifies no omission whatever, except in reference to the subject of presumptions, more of which it affirms, should be included 'in a Code aiming at completeness.'

The charge of incompleteness, then, comes to this, that the Bill does not deal fully enough with the two subjects of judgments and presumptions. I will refer to those points hereafter ; but I will first, with your Lordship's permission, say a few words on the positive grounds on which I assert that the Bill does form a complete Code, and does deal with every subject which has been dealt with by English text-writers on evidence or by English legislation. This leads me, in the first place, to notice the remark that it consists of bits of *Taylor on Evidence* 'arbitrarily' chosen. There is a certain amount of truth in this charge, about as much truth, and truth of the same kind, as there would be in saying that the speech which I am now making is composed of words arbitrarily chosen out of the dictionary. I could hardly mention any English law-book in common use, which is, or ever pretends to be, much more than a large index, made up of extracts from cases strung together with little regard as to any other than a very superficial perfunctory arrangement of the subject-matter. There is always some one book which is in possession of the field at a given moment, because it is more complete than its rivals, and has the latest cases and Statutes entered up in it. This position at present is occupied by Mr. Taylor's book, as it was occupied before his time by Gilbert, Phillips, Starkie and others ; and as analogous positions are occupied, in relation to other subjects, by *Russell on Crimes*, *Bullen on Pleading*, and other works known to all lawyers. To say, however, that the Bill now before the Council consists of bits taken from Taylor, and especially of bits taken 'arbitrarily,' is altogether incorrect. In the first place, the arrangement of the Bill, and the general conception of the subject on which that arrangement is based, are altogether unlike anything in Taylor or in any other text-book on the subject with which I am acquainted. Nowhere in Taylor, nor in Mr. Norton's own book on the subject, will be found any recognition of the distinction between the relevancy of facts and the proof of facts, or any, even the faintest, perception

of the extreme ambiguity and uncertainty which, as I showed in the observations which I addressed to the Council a year ago, have been thrown over the whole subject by the absence of anything like an attempt to define with precision the fundamental terms of the subject, and especially the words 'fact' and 'evidence.' As to the notion that bits of Taylor have been 'arbitrarily' put together in the Bill, I will only say that, at a proper time and place, I would undertake to assign the reason why every section stands where it does. Upon the question of completeness, however, I will make this remark: I assert that every principle applicable to the circumstances of British India which is contained in the 1,598 royal octavo pages of *Taylor on Evidence*, is contained in the 167 sections of this Bill: I also assert that the Bill has been carefully compared, section by section, with the last edition of Mr. Norton's work upon evidence, and that it disposes fully of every subject of which Mr. Norton treats.

As to the specific instances of incompleteness which are alleged against the Bill, two only are of any importance, and upon each of them I will say a few words.

The first is, that the Chapter on Judgments is meagre. My answer is, that it may appear meagre to those who take their notions of the Law of Evidence from works like Mr. Taylor's; but that it contains everything which properly belongs to the subject. Its utter absence of arrangement and classification on every subject is the great reproach of the law of England, and one of the strongest instances of it is to be found in the way in which provisions of an essentially different character are frequently comprised under the same head. I might give many illustrations of this; but the Law of Evidence, I think, supplies more glaring illustrations than any other department of law. Many English writers have treated the subject in such a manner as to make it comprise the whole body of the law. Thus, for instance, *Starkie's Law of Evidence* deals with the whole range of the criminal law and of actions for

contracts and wrongs. His book contains, not merely rules about hearsay and secondary evidence and the like, but a specification of the sort of facts which it is permissible to prove on a charge of murder, or in an action for libel, in order to show malice, or under the plea of not guilty in such an action. It is obvious that the Law of Evidence thus conceived would include nearly the whole of the substantive law, and it follows, I think, that it is of great importance to draw the line distinctly between what properly belongs to the subject and what does not. It is for this reason that the sections about judgments are drawn in their present form, and that certain topics connected with judgments, which are often dealt with by writers on evidence, are omitted from the Bill. The subject is very technical; but I will endeavour to explain it in few words.

The second section of the Code of Civil Procedure enacts that—

“The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties, or between parties under whom they claim.”

The Code of Criminal Procedure enacts that a man shall not be tried again after he has once been acquitted or convicted. It is a matter of great difficulty and intricacy to describe the precise effect of these provisions, and to show how they apply to a variety of cases which may arise. Mr. Broughton's edition of the Code of Civil Procedure contains ten large pages, in very small print, of notes of the cases which have been decided on the second section of the Code of Civil Procedure, and a certain number of decisions have been given on the corresponding sections of the Code of Criminal Procedure; and it is because this Bill does not codify those decisions that it is described as meagre. My answer to the criticism is, that the authors of the two Codes in question were quite right in considering the matter as essentially a matter of procedure. It no more belongs to the Law of Evidence than a thousand other questions which

are sometimes connected with it. There are, for instance, cases in which insanity excuses an act which, but for its existence, would be a crime. If a man defends himself on the ground of insanity, he must give evidence of it, just as he must prove the existence of a judgment barring his antagonist's right to sue if he relies on the right's being so barred; but it appears to me that it would be as reasonable to treat the question of the effect of insanity on responsibility as a part of the Law of Evidence, because, in particular cases, it may be necessary to give evidence of insanity, as to treat the law as to the effect of a previous judgment on a right to sue as part of the Law of Evidence, because, in certain cases, it may be necessary to give evidence of the existence of a previous judgment.

The only questions connected with judgments, which do appear to me to form part of the Law of Evidence properly so called, are dealt with in secs. 40—44 of the Bill. These sections provide for the cases in which the fact that a Court has decided as to a given matter of fact relevant to the issue may be proved for the purpose of showing that that fact exists. This, no doubt, is a branch of the Law of Evidence, and the provisions referred to dispose of it fully.

As to the subject of presumptions, my answer to the critics of the Bill is partly to the same effect, though their criticisms were perhaps better founded. I must admit that the Bill as introduced dealt less fully with this subject than was thought desirable on further consideration and some additions to it have accordingly been introduced, though the general principle on which the matter was dealt with is maintained. The subject of presumptions is one of some degree of general interest. It was a favourite enterprise on the part of continental lawyers to try to frame systems as to the effect of presumptions which would spare Judges the trouble of judging of facts for themselves by the light of their own experience and common sense. A presumption was an artificial rule as to the value and import of a particular proved fact.

These presumptions were almost infinite in number and were arranged in a variety of ways. There were rebuttable presumptions, and presumptions which were irrebuttable. *Præsumptiones juris et de jure*, *Præsumptiones juris*, *Præsumptiones facti*. There were also an infinite variety of rules for weighing evidence; so much in the way of presumption and so much evidence was full proof, a little less was half-full, and so on. Scraps of this theory have found their way into English law, where they produce a very incongruous and unfortunate effect, and give rise to a good deal of needless intricacy. Another use to which presumptions have been put is that of engrafting upon the Law of Evidence many subjects which in no way belong to it. For instance, there is said to be a conclusive presumption that every one knows the law, and this is regarded as necessary in order to vindicate the further proposition that no one is to be punished for breaking a law of which he was ignorant. To my mind this is simply expressing one truth in the shape of two falsehoods. The plain doctrine, that ignorance of the law is no excuse for breaking it, dispenses with the presumption, and hands the subject over, from the Law of Evidence with which it is accidentally connected, to criminal law to which it properly belongs.

I will not weary the Council by going into all the details of the subject, though I could with perfect ease, if it would not take too long, answer specifically the remark of the Madras Government on this matter. That Government says—

“Sections 102—4 contain three instances of presumptions, selected from a chapter of the Law of Evidence which in Taylor fills 111 sections. It is difficult to see why any should be inserted when so few are chosen.”

In general terms the answer is this; large parts of Mr. Taylor's chapter relate to topics which have nothing to do with the Law of Evidence. Those which are of practical importance are all included in the Bill as it stands (a few were no doubt omitted in the first draft), and they fall



under these heads: 1st—There are a few cases in which it is expedient to provide that one fact shall be conclusive proof of another, for various obvious reasons—the inference of legitimacy from marriage is a good instance. 2ndly—There are several cases in which Courts would be at a loss as to the course which they ought to take under certain circumstances without a distinct rule of guidance. After what length of absence unaccounted for, for instance, may it be presumed that a man is dead? The rule is that seven years is sufficient for the purpose. Obviously, six or eight would do equally well; but it is also obvious that, to have a distinct rule is a great convenience. All cases of this kind fall properly under the head of the Burden of Proof, and I think it will be found that the provisions contained in Chapter VII of the Bill provide for all of them. A new section (114) has been added to this Chapter, which deserves special notice. Its substance was, I think, implied in the original draft of the Bill; but it has been inserted in order to put the matter beyond all possibility of doubt. It is in the following words:—

“114. The Court may presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

#### *Illustrations.*

The Court may presume—

(a) That a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;

(b) That an accomplice is unworthy of credit, unless he is corroborated in material particulars;

(c) That bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration;

(d) That a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist, is still in existence;

(e) That judicial and official acts have been regularly performed;

(f) That the common course of business has been followed in particular cases;

(g) That evidence which could be, and is not, produced, would, if produced, be unfavourable to the person who withholds it ;

(A) That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him ;

(c) That when a document creating an obligation is in the hands of the obligor, the obligation has been discharged.

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before them :—

As to illustration (a)—A shop-keeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business :

As to illustration (b)—A, a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally good character, who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself :

As to illustration (b)—A crime is committed by several persons. A, B and C, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable :

As to illustration (c)—A, the drawer of a bill of exchange, was a man of business. B, the acceptor, was a young and ignorant person, completely under A's influence :

As to illustration (d)—It is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course :

As to illustration (e)—A judicial act, the regularity of which is in question, was performed under exceptional circumstances :

As to illustration (f)—The question is, whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances :

As to illustration (g)—A man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family :

As to illustration (h)—A man refuses to answer a question which he is not compelled by law to answer, but the answer to it might

cause loss to him in matters unconnected with the matter in relation to which it is asked :

As to illustration (1)—A bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it."

The effect of this provision, coupled with the general repealing clause at the beginning of the Bill, is to make it perfectly clear that Courts of Justice are to use their own common sense and experience in judging of the effect of particular facts, and that they are to be subject to no technical rules whatever on the subject. The illustrations given are, for the most part, cases of what in English law are called presumptions of law; artificial rules as to the effect of evidence by which the Court is bound to guide its decision, subject, however, to certain limitations which it is difficult either to understand or to apply, but which will be swept away by the section in question. I am not quite sure whether, in strictness of speech, the rule that an accomplice is unworthy of credit, unless he is confirmed, can be called a presumption of law, though, according to a very elaborate judgment of Sir Barnes Peacock's, it has, at all events, some of the most important characteristics of such a presumption. Be this how it may, the indefinite position in which it stands has been the cause of endless perplexity and frequent failures of justice. On the one hand, it is clear law that a conviction is not illegal because it proceeds on the uncorroborated evidence of an accomplice; on the other hand, it seems to be also law that, in cases tried by a jury, the Judge is bound by law to tell them that they ought not to convict on such evidence, though they can if they choose. How a Sessions Judge (sitting without a jury) is to give himself a direction to that effect, and how a High Court is to deal with a case in which he has convicted, although he told himself that he ought not to convict, I do not quite understand. At all events, it seems to me quite clear that he ought to be at liberty to use his discretion on the subject. Of course, the fact that a man is an accomplice forms a strong objection, in most cases, to

his evidence; but every one, I think, must have met with instances in which it is practically impossible to doubt the truth of such evidence, although it may not be corroborated, or although the evidence by which it is corroborated is itself suspicious.

As I have already observed, I do not wish to trouble the Council with technicalities; but I hope this explanation will show that this part of the Bill, at all events, is not incomplete.

I may observe that many topics closely connected with the subject of evidence are incapable of being satisfactorily dealt with by express law. It would be easy to dilate upon the theory on which the whole subject rests and the manner in which an Act of this kind should be used in practice. I think, however, that it would not be proper to do so on the present occasion. I have therefore put into writing what I have to say on these subjects, and I propose to publish what I have written, by way of a commentary upon, or introduction to, the Act itself. I hope that this may be of some use to the Civil Servants who are preparing for their Indian career, and to the law students in Indian Universities. The subject is one which reaches far beyond law; for the Law of Evidence is nothing unless it is founded upon a rational conception of the manner in which truth as to all matters of fact whatever ought to be investigated.

I now turn to a criticism made on the Bill by His Honour the Lieutenant-Governor of Bengal, who appears to be somewhat dissatisfied with the manner in which the Bill deals with the question of relevancy, which, as he says, is a question of degree.

"The Lieutenant-Governor has no doubt that the law, clearing up the obscurity now prevailing as to rules of evidence, protecting our Courts from the intrusion of a foreign law of evidence in no way applicable, and rendering the Judges in some degree masters in their own Courts, will be highly beneficial. His principal doubt is, whether it is possible to define by law what evidence is relevant and what is not. He is inclined to think that relevancy is a question of degree ;

that the relevant shades off into the irrelevant by imperceptible degrees. It may be that it is easier to decide, in each case, what is substantially material to the issue, or so remote in its relevancy that the time of the Court should not be occupied, than to lay down by rule of law what is to be considered relevant and what not. Such rules must necessarily be somewhat refined, and, as it were, metaphysical. If it were allowed to argue the question whether any piece of evidence is, or is not, admissible under such rules, the Lieutenant-Governor would fear that the Court might be lost in disputations. If, however, the rules regarding relevancy be treated as merely an authoritative treatise on evidence for the guidance of Judges, which they are to study and follow as well as they can, but that they are not bound to hear objections and arguments based upon it, the Lieutenant-Governor has no doubt that the rules in the draft are admirably suited to the purpose, and would be extremely useful. It does not seem to him very clear in the draft whether or no Counsel are to be entitled to take objection to evidence at every turn, and to argue the question as to whether it is or is not admissible under the evidence rules. It seems of great importance that this should be made clear; for, if Counsel may object and argue, the Lieutenant-Governor certainly has great fear that the argumentations regarding relevancy will be endless."

I cannot altogether agree with these remarks. As to the arguments of Counsel, I do not feel that horror of them which His Honour appears to feel. It is, I think, abundantly clear that Counsel will be permitted to argue as to the relevancy of evidence, and as to the propriety of proof, and I do not see how a law can be laid down at all upon which Counsel are never to argue. No one, I think, will seriously assert that lawyers, as a class, are an impediment to the administration of justice, or otherwise than an all-but-indispensable assistance to it; but if they are to exist at all, they must argue as well on evidence as on other subjects. I must, however, observe that every precaution has been taken to prevent useless and trifling argument. In the first place, if the Judge wishes to know about any fact the relevancy of which is under debate, he can cut the matter short by asking about it himself under section 165. In the second place, the mere admission or rejection of improper evidence is not to be a ground for a new trial or the reversal of a decision.

The fact that the opposite is the rule in England is the great cause of the enormous intricacy and technicality of English law on this point. If, in the Tichborne case, one single question had been permitted after being objected to, and if the Court had afterwards been of opinion that it had been wrongly permitted, then, however trifling the matter might have been, the party whose objection had been wrongly overruled would have been by law entitled to a new trial, and the whole enormous expense of the first trial would have been thrown away. This never was the law in India, or will it be so now. The result is, that the provisions about relevancy will be useful principally as guides to the Judges and the parties, and, in particular, as rules which will enable the Judge to shut out masses of irrelevant matter which the parties are very likely to wish to introduce. As to the more general question, I think that it is possible to give the true theory of the relevancy of facts, and if I thought it desirable to enter upon a very abstract matter in this place, I think I could show what this theory is, and how this Bill is founded upon it. Be this, however, as it may, and taking a view, not indeed less practical, but more immediately and obviously practical, I would make the following observations:—I am quite aware that relevancy is, as His Honour observes, a matter of degree, and for that reason the Bill gives definition of it so wide and various, that I think they will be found to include every sort of fact which has any distinct assignable connection with any matter in issue. The sections which define relevancy are, indeed, enabling sections. Any fact which fulfils any one of the many conditions which they declare to constitute relevancy will be relevant, and most facts which have any real connexion with the matter to be proved would fulfil several of them. Take, for instance, this fact—A man is charged with theft and it is proved that he was seen running away immediately after the theft with the stolen goods in his hand. This is (1) a fact so connected with a fact in issue as to form part of the same transaction, and is there-

fore relevant under section 6; (2) it is the effect of a fact in issue, and is therefore relevant under section 7; (3) it is the conduct of a party to the proceeding subsequent to a fact in issue, and is so relevant under section 8; (4) it is a fact which in itself renders a fact in issue highly probable, and is therefore relevant under section 11. This fact, therefore, is relevant under no less than four sections, each of which would admit a great number of facts which would not be admitted by the other sections. Indeed, the latitude of the definition of relevancy will be best appreciated by negating the conditions which the Act imposes. Suppose that you are able to assert of a fact that it is neither itself in issue, nor forms part of the same transaction, nor is its occasion, cause or effect, immediate or otherwise; that it shows no motive or preparation for it; that it is no part of the previous or subsequent conduct of any person connected with the matter in question; that it does not explain or introduce any fact which is so connected with the matter in question, or rebut or support any inference suggested thereby, or establish the identity of any person or thing connected with it or fix the time of any event the time of which is important; that it is not inconsistent with any relevant fact or facts in issue; and that, neither by itself nor in connection with other facts, does it make any such fact highly probable—if all these negatives can be affirmed, I think we may say, without much risk of error, that the one fact has nothing to do with the other, and may be regarded as irrelevant.

I now come to a matter which has excited a good deal of discussion, though it relates to a subordinate and not very important part of the Bill—that which concerns the examination of witnesses by Counsel. The Bill as originally drawn provided, in substance, that no person should be asked a question which reflected on his character, as to matters irrelevant to the case before the Court, without written instructions; that if the Court considered the question improper, it might require the production of the

instructions; and that the giving of such instructions should be an act of defamation, subject, of course, to the various rules about defamation laid down in the Penal Code. To ask such questions without instructions was to be a contempt of Court in the person asking them, but was not to be defamation.

This proposal caused a great deal of criticism, and in particular produced memorials from the Bars of the three Presidencies. It was also objected to by most of the Local Governments to whom the Bill was referred for opinion. Some of the objections made to the proposal were, I thought, well founded. It was pointed out, in the first place, that the difficulty of obtaining the written instructions would be practically insuperable; in the next place, that the Native Bar throughout the country were already subject to forms of discipline which were practically sufficient; and, in the third place—and perhaps this was the most important argument of all—that, in this country, the administration of justice is carried on under so many difficulties, and is so frequently abused to purposes of the worst kind, that it is of the greatest importance that the characters of witnesses should be open to full inquiry. These reasons satisfied the Committee, and myself amongst the rest, that the sections proposed would be inexpedient, and others have accordingly been substituted for them, which I think will in practice be found sufficient. The substituted sections are as follows:—

“146. When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend—

- (1) to test his veracity;
- (2) to discover who he is and what is his position in life, or
- (3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him, or might expose, or tend directly or indirectly to expose, him to a penalty or forfeiture.

147. If any such question relates to a matter relevant to the suit or proceeding, the provisions of sec. 132 shall apply thereto.



148. If any such question relates to a matter not relevant to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations :—

(1). Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies.

(2). Such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies.

(3). Such questions are improper if there is a great disproportion between the importance of the imputations made against the witness's character and the importance of his evidence.

(4). The Court may, if it sees fit, draw from the witness's refusal to answer, the inference that the answer, if given, would be unfavourable.

149. No such question as is referred to in sec. 148 ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well-founded.

#### *Illustrations.*

(a). A barrister is instructed by an attorney or vakil that an important witness is a dacoit. This is a reasonable ground for asking the witness whether he is a dacoit.

(b). A pleader is informed by a person in Court that an important witness is a dacoit. The informant, on being questioned by the pleader, gives satisfactory reasons for his statement. This is a reasonable ground for asking the witness whether he is a dacoit.

(c). A witness, of whom nothing whatever is known, is asked at random whether he is a dacoit. There are here no reasonable grounds for the question.

(d). A witness, of whom nothing whatever is known, being questioned as to his mode of life and means of living, gives unsatisfactory answer. This may be a reasonable ground for asking him if he is a dacoit.

150. If the Court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any barrister, pleader, vakil or attorney, report the circumstances of the case to the High Court or other authority to which such barrister, pleader, vakil or attorney is subject in the exercise of his profession.

151. The Court may forbid any questions or enquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

152. The Court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form."

The object of these sections is to lay down, in the most distinct manner, the duty of Counsel of all grades in examining witnesses with a view to shaking their credit by damaging their character. I trust that this explicit statement of the principle according to which such questions ought or ought not to be asked, will be found sufficient to prevent the growth, in this country, of that which in England has on many occasions been a grave scandal. I think that the sections, as far as their substance is concerned, speak for themselves, and that they will be admitted to be sound by all honourable advocates and by the public. I cannot leave the subject without a few remarks on the memorials which the sections originally proposed have called forth from the Bar in various parts of the country. As none of the bodies in question have made any further remarks on the Bill, since it appeared in the Gazette in its amended form about a month ago, I suppose that the alterations made in the Bill have removed the main objections which they felt to it. I need not therefore notice those parts of their memorials which were directed against the consequences which they apprehended from the sections which have been given up. They contain, however, other matter which I feel compelled to notice. I need not refer to all the memorials. The one sent in by the Calcutta Bar was for the most part proper, though it contained passages which I think

might as well have been omitted. The memorial of the Bombay Barristers contains similar passages, expressed more fully and less temperately, and I shall accordingly confine myself to noticing such of their remarks as appear to me to deserve notice.

I may observe, in the first place, in general, that I have read in the newspapers and in these memorials much that can only mean that I individually was actuated in drawing this Bill by hostility to the Bar; indeed, the Bombay memorial says, in so many words, that remarks made by one member (meaning, I suppose, me) in Council 'appear to contemplate the extinction of the profession of Barrister-at-Law in India.' In support of this surprising statement, they quote, as being 'open to no other construction,' the following words from the report of the Select Committee:—

"The English system, under which the Bench and Bar act together and play their respective parts independently, and the professional organization on which it rests, does not as yet exist in this country, and will not, for a very long course of time, be introduced."

Before I make the remarks which this suggests, let me ask your Lordship and the Council whether a charge that I, of all people, wish for the extinction of the profession of Barrister-at-Law in India, is not upon the face of it absurd; I am myself a Barrister of eighteen years' standing, and a Queen's Counsel of four years' standing. I believe that there is no Barrister in British India of whom I should not be entitled to take precedence, professionally, if I chose to practice here; and so strong is my connection with my profession, that I am at this moment on the point of resigning one of the most responsible offices which a Barrister can hold, for the purpose of returning to the ordinary routine of professional practice. How is it possible to imagine that a man so situated should be hostile to the profession? When the Bill was introduced I was—as I still am—anxious to do whatever lies in my power to preserve the honour and dignity of my profession, and to prevent its good name, from being disgraced. For this reason, I devised what I

regarded as an appropriate remedy for a great and crying evil ; one with which I have been much impressed by my own observation in England, and which is likely to extend in India as the habit of cross-examination becomes more general, and when the right which a cross-examining advocate has are explicitly defined. The remedy, I will admit, was to some extent inappropriate ; but for merely proposing it, for merely recognizing the existence of the evil against which it was directed, I am charged with wishing to extinguishing my own profession.

The real meaning of the expressions in the report (for which I am fully responsible) was, I think, so plain, that I cannot understand how the memorialists can have ascribed to them a sense which I think they could never suggest to any fair mind. The report said :—

“The English system, under which the Bench and the Bar act together and play their respective parts independently, and the professional organization on which it rests, does not as yet exist in this country, and will not for a very long course of time be introduced.”

Yes, say the memorialists, ‘it does exist, to wit, in the Presidency-towns.’ This is much as if the water-works of Calcutta were referred to, to contradict a statement that India is wretchedly supplied with drinking water. I make a statement about an Empire as large as Europe without Russia, and am told that it is incorrect, because there are three English Courts, and three knots of, perhaps, a dozen or so English Barristers, to be found at towns which are in the nature of English settlements. The reason why the statement complained of was not qualified by excepting these towns and Courts was simply that the exception was not important enough to be stated. It would, indeed, have been matter of great indifference to me, personally, whether the Bill extended to the High Courts sittings on the original side or not. It is a mistake to make exceptions without a necessity for them ; but the question, what rules of evidence should apply in the Presidency-towns, is one of very little real importance. The great and vital import-

ance of the matter lies in the effect which it will have on the administration of justice throughout the country at large. It is framed in order to meet the wants, and lighten the labours, of district officers, by giving them a short and clear view of a subject which has been converted into a sort of professional mystery, the knowledge of which was confined to a knot of persons specially initiated in it. Now, as regards the Mofussil, I repeat the expressions complained of. I assert that they are absolutely true, and state a fact notorious to every one. I say that, throughout India generally, nothing like the English system under which the Bench and Bar act together and play their respective parts independently does now exist, or can for a length of time be expected to exist. Let me just recall for a moment the nature of that system. In the first place, the Bench and the Bar in England form substantially one body. The Judges have all been Barristers, and the great prize to which the Barristers look forward is to become Judges. That is not the case in India, nor anything like it. The great mass of Indian Judges are not, and never have been, lawyers at all; the great mass of Indian lawyers have no chance or expectation of becoming Judges, and many of them have no wish to do so. Even in the Presidency-towns, the whole organization of the profession differs from that of England in ways which I do not think it necessary to refer to, but which are of great importance. I may, however, observe that the position of an English Barrister who practises in the Mofussil, whether he is habitually resident in a Presidency-town or not, is altogether different from that of an English Barrister in his ordinary practice in England. An English Barrister on Circuit, and even at the Quarter Sessions, is subject to a whole series of professional restraints and professional rules, which do not, and cannot, apply to practice in the Mofussil in this country. He acts under the eyes of a public which takes great interest in his proceedings, and puts a powerful check upon them. He practises in important cases before Judges whom he feels and knows

to be his professional superiors, and to whom he is accustomed. No one of these remarks applies to a Barrister from a Presidency practising in the Mofussil. The result of this state of things must be matter of opinion. It is impossible to discuss the subject in detail. The Bombay and Calcutta memorialists consider it eminently satisfactory: let us hope they are right. My opinion, of course, is formed upon grounds which it is not very easy to assign, and, as it can be of little importance, I shall not express it. In any case this Bill can do no harm.

Passing, however, from the case of English Barristers to the case of pleaders and vakils, and the Courts before which they practise, I would appeal to every one who has experience of the subject; whether the observations referred to are not strictly true, and whether the main provision founded upon them—the provision which empowers the Court to ask what question it pleases—is not essential to the administration of justice here. In saying that the Bench and the Bar in England play their respective parts independently, what I mean is that, in England, cases are fully prepared for trial before they come into Court, so that the Judge has nothing to do but to sit still and weigh the evidence produced before him. In India, in an enormous mass of cases, this neither is nor can be so. It is absolutely necessary that the Judge should not only hear what is put before him by others, but that he should ascertain by his own inquiries how the facts actually stand. In order to do this, it will frequently be necessary for him to go into matters which are not themselves relevant to the matter in issue, but may lead to something that is, and it is in order to arm Judges with express authority to do this that sec. 165, which has been so much objected to, has been framed.

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**C.****DIFFERENCES BETWEEN THE ENGLISH AND THE  
INDIAN LAWS OF EVIDENCE.\***

1. In England the particulars of the complaint may not be disclosed by the witnesses for the prosecution either as original or confirmatory evidence, and the details of the statement can only be elicited by the prisoner's counsel on cross-examination. Under the Indian Act, sec. 8, illa. (j) and (k), the terms of the complaint are admissible as original evidence.

2. To prove the existence of a conspiracy or to show that any person was a party to it, a letter giving an account of the conspiracy is admissible under the Indian Act, sec. 10, even though not written in support of it or in furtherance of it. The contrary rule is followed in England.

3. In India the inducement which renders a confession inadmissible must proceed from the person in authority. In England it is sufficient if made by any one and sanctioned by the silence of the person in authority.

4. In India it is necessary to prevent the police from torturing persons in their custody for the purpose of extorting confessions. Therefore every confession to a police officer except in the presence of a Magistrate is inadmissible. Not so in England.

5. In England the confession of an accused person is not evidence against any one beyond himself. Under the Evidence Act, sec. 30, where two persons are being jointly tried, a confession by one of the prisoners may be used against the other. The Judges construe the section strictly.

6. In England dying declarations are only admissible when the death of the deceased is the subject of the charge, and when made while the declarant is expecting death. In India they are admissible when not so made, and in all civil and criminal trials.

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\* *Vide Griffith's Evidence.*

7. In England to make entries in the course of business admissible, they must be made contemporaneously with the acts to which they relate. In India there is no such restriction.

8. In England the declaration of an illegitimate member of a family would not be admissible in a pedigree case. In India the statements of friends, neighbours, servants, and of a deceased person respecting his own illegitimacy would be admissible.

9. In India statements made by deceased persons, and contained in documents relating to private persons, are admissible upon questions of private rights.

10. In England entries in registries and public books must have been promptly made, and in the manner, if any, required by law. The Evidence Act contains no such rule.

11. In England a foreign judgment is little more than evidence of a debt. In an action thereon the trustees of property of which the judgment-debtor is beneficial owner cannot be joined as parties—*Hawkesford v. Giffard*, 12 App. Cas. 122.

#### INDIAN PECULIARITIES BEARING ON EVIDENCE.

1. In civil cases and in most criminal cases there is no jury. English rules, therefore, founded on the separation of the functions of the Judge and jury are not so extensively applicable.

2. The practitioners in many of the Mofussil Courts cannot yet be relied on to object to improper questions or to object to the admission of evidence or to take a note of the grounds on which a Judge admits or rejects evidence. In cross-examination one question as to previous conviction and another as to enmity with the party against whom the witness is produced constitute the ordinary stock of the querist.

3. The police are more corruptible than in England. They are inclined to extract evidence by means of torture.



Their object frequently is not only to discover a criminal but to affix criminality to an individual: they accordingly stimulate a culprit to exculpate himself by accusing an accomplice. In the Mofussil they prepare cases for trial, but they have little detective skill. They do not understand what evidence is necessary or legally admissible. Their practice is to adopt a theory, in the support of which they mould the evidence, and even manufacture a necessary link when it cannot be otherwise supplied.

4 and 5. Witnesses in India are far less truthful, far less accurate in observation, especially of time and distance, than the corresponding class of witnesses in England, more timid, more revengeful, more apt to conspire to give false evidence, more prone to raise a false defence even when not guilty. It is rarely possible to accept and act upon direct evidence unless corroborated. "Oral evidence," said the High Court in the *Ramnad Case* (I. L. R. 2 M. S. 233), "is *prima facie* not entitled to belief, and in this country, where in a civil cause we say that we believe, our meaning can only be that being compelled to come to a conclusion it is more reasonable to come to one than to another." But judicial officers must not be too prone to be suspicious. They must form a deliberate judgment according to the ordinary legal and reasonable presumptions of fact, P. C. 14 Moor. I. A. 354.

6. The practice of drilling witnesses is far more frequent in India than in England.

7. Genuine confessions are frequently retracted by the people of this country. An oriental has not the same tenacity that a western has. The former is usually more or less a fatalist, says of the victim of his ungovernable rage that his time had come, and seeks for momentary peace by confessing the crime, thinking that his own time too has come. When the blandishments of the police are gone and he mixes with the other prisoners, his mind recovers a steadier balance, and he falsely retracts the truth which he had told.

8. Dying declarations are not entitled to the weight of those made in England. Very often the murdered man before his death implicates every member of his supposed murderer's family, or of the supposed instigator of the murder, hoping by this means to drink the cup of revenge to its last dregs, and to rid his own family of all future annoyance.

9. In England written documents are seldom executed except by those who can read and write and are capable of looking after their own interests. In India bonds are daily executed by men who are either too ignorant to understand a written document, or too poverty-stricken and helpless to contend with a mahajan or sahukar on equal terms.

10. In India the bulk of the internal trade is in the hands of gomastas who are treated as the agents of their employers, and nearly every mercantile transaction is effected through the medium of dallals. It is therefore especially important that the admission of an agent in the matter of his agency should be taken as the admission of his principal.

11. The Indian Evidence Act is less strict in respect of the proof of foreign law than the English, in that it allows foreign law books to be referred to without the assistance of an expert.

12. In India judgments *in rem* are conclusive in criminal as well as civil proceedings. In the *Duchess of Kingston's Case* (State Trials and 2 Smith L. C.), it was decided that a judgment as to personal status was inadmissible in a criminal trial.

13. Section 44 permits a party to show that a judgment was obtained by his own fraud. The rule is otherwise in England.

14. In India—see section 45—on questions of sanity, the opinions of experts only are receivable. In England ordinary witnesses may give an opinion as to the mental capacity of a testator.

15. The present Act allows a witness to be prejudiced in the trial by evidence of any previous conviction for crime.

In England a previous conviction can only be used during the trial in answer to evidence of character.

16. In India the opinions of experts and the grounds thereof contained in treatises may be used should the expert be dead, and the treatise containing it be the evidence thereof.

17. Certificates of births, deaths, and marriages may in India be used in criminal trials.

18. Comparison of disputed seals no less than of disputed writings may be made by witnesses in both criminal and civil proceedings.

19. Section 112 does not permit the rebuttal of legitimacy by proof of impotency.

20. Section 118 renders the evidence of a child who understands the questions and can give rational answers admissible, though it believe not in a future state.

21. Section 120 makes husbands and wives competent witnesses for and against each other both in criminal and civil proceedings.

22. Section 131 gives a greater privilege to persons not parties to the suit as to the non-production of title-deeds than the English law does, notwithstanding forgery and fraud are so prevalent in India. For, in England, when the deed has been partly set out or fraud has been suspected, production has been ordered. The Indian Act ignores both trusts and implied agreements to produce deeds.\*

23. In India a witness is not excused from answering a question which tends to expose him or her, his or her wife or husband, to a criminal charge ; though such answer cannot be used against the witness except in a trial for false evidence.

24. In India, on trials for offences analogous to treason, for perjury, of bastardy, of breach of promise, a single witness may suffice.

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\* In England, a solicitor must produce a title document when his client would be bound to produce it—*Bursall v. Tunner*, C. A. 16 Q. B. D. 1.

25. Section 157 does not provide for the impeachment of the credit of a witness by evidence contradicting his statements. But it admits evidence of a prior statement if made contemporaneously with the fact or before a competent authority to corroborate his testimony.

26. The Judge may ask any question he pleases in any form and at any time without giving counsel the right of cross-examining. The English rule is the direct opposite (18 Q. B. D. 537).

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## D.

### ACT No. XVIII OF 1872.

(RECEIVED THE GOVERNOR-GENERAL'S ASSENT ON THE  
29TH AUGUST 1872).

#### *An Act to amend the Indian Evidence Act, 1872.*

WHEREAS it is expedient to amend the Indian Evidence  
Preamble. Act, 1872; It is hereby enacted as follows:—

1. This Act may be called "The Indian Evidence Act  
Short title. Amendment Act."

2. In section thirty-two of the Indian Evidence Act,  
Amendment of Act I of 1872, section 32, clauses 5 and 6. 1872, clauses five and six, after the word "relationship," the words "by blood, marriage or adoption" shall be inserted.

3. In section forty-one of the same Act, lines seventeen,  
Amendment of section 41. twenty and twenty-three, after the word "judgment," the words "order or decree" shall be inserted.

4. In section forty-five of the same Act, line five, after  
Amendment of section 45. the word "art," the words "or in questions as to identity of handwriting" shall be inserted.

5. In section fifty-seven of the same Act, paragraph (13),  
Amendment of section 57. after the word "road," the words "on land or at sea" shall be inserted.

6. In section sixty-six of the same Act, line five, after  
 Amendment of the word "is," the words "or to his attor-  
 section 66. ney or pleader" shall be inserted.

7. In section ninety-one of the same Act, Exception 2,  
 Amendment of for the words "under the Indian Succession  
 section 91. Act," the words "admitted to probate in  
 British India" shall be substituted.

8. [*Repealed by Act No. XII of 1876*].

9. In section one hundred and eight of the same Act,  
 Amendment of line one, for the word "When," the words  
 section 109. "Provided that when" shall be substituted;  
 and, in the last line, for the word "on," the words "shifted  
 to" shall be substituted.

10. In section one hundred and twenty-six of the same  
 Amendment of Act, line twenty-two, and in section one  
 sections 126 and hundred and twenty-eight of the same Act,  
 128. line six, after the word "barrister," the  
 word "pleader" shall be inserted.

In section one hundred and twenty-six of the same Act,  
 line fifteen, for the word "criminal," the word "illegal"  
 shall be substituted.

11. In section one hundred and fifty-five of the same  
 Amendment of Act, paragraph (2), for the word "had," the  
 section 155. word "accepted" shall be substituted.

12. [*Repealed by Act No. X of 1873*].

## E.

### ACT No. X OF 1873.

(RECEIVED THE GOVERNOR-GENERAL'S ASSENT ON THE 8TH  
 APRIL 1873).

### The Indian Oaths Act, 1873.

*An Act to consolidate the law relating to Judicial Oaths,  
 and for other purposes.*

WHEREAS it is expedient to consolidate the law relating  
 Preamble. to judicial oaths, affirmations and declara-

tions, and to repeal the law relating to official oaths, affirmations and declarations ; It is hereby enacted as follows :—

*I.—Preliminary.*

**Short title.** 1. This Act may be called “The Indian Oaths Act, 1873 :”

**Local extent.** It extends to the whole of British India, and, so far as regards subjects of her Majesty, to the territories of Native Princes and States in alliance with her Majesty ;

**Commencement.** And it shall come into force on the first day of May 1873.

2. [*Repealed by Act No. XII of 1873*].

**Saving of certain oaths and affirmations.** 3. Nothing herein contained applies to proceedings before Courts Martial, or to oaths, affirmations or declarations prescribed by any law which, under the provisions of the Indian Councils’ Act, 1861, the Governor-General in Council has not power to repeal.

*II.—Authority to administer Oaths and Affirmations.*

**Authority to administer oaths and affirmations.** 4. The following Courts and persons are authorized to administer, by themselves or by an officer empowered by them in this behalf, oaths and affirmations in discharge of the duties or in exercise of the powers imposed or conferred upon them respectively by law :—

(a) All Courts and persons having by law or consent of parties authority to receive evidence ;

(b) The Commanding Officer of any military station occupied troops in the service of her Majesty : provided

(1) that the oath or affirmation be administered within the limits of the station, and

(2) that the oath or affirmation be such as a Justice of the Peace is competent to administer in British India.

*III.—Persons by whom Oaths or Affirmations must be made.*

Oaths or affirmations to be made by—

5. Oaths or affirmations shall be made by the following persons:—

(a) all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any Court or person having by law or consent of parties authority to examine such persons or to receive evidence:

(b) interpreters of questions put to, and evidence given by, witnesses, and

jurors. (c) jurors.

Nothing herein contained shall render it lawful to administer in a criminal proceeding an oath or affirmation to the accused person, or necessary to administer to the official interpreter of any Court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties.

Affirmation by Natives or by persons objecting to oaths.

6. Where the witness, interpreter or juror is a Hindu or Muhammadan,

or has an objection to making an oath,

he shall, instead of making an oath, make an affirmation.

In every other case the witness, interpreter or juror shall make an oath.

*IV.—Forms of Oaths and Affirmations.*

7. All oaths and affirmations made under section 5 shall be administered according to such forms as

Forms of oaths and affirmations.

the High Court may from time to time prescribe.

And until any such forms are prescribed by the High Court, such oaths and affirmations shall be administered according to the forms now in use.

*Explanation.*—As regards oaths and affirmations administered in the Court of the Recorder of Rangoon and

the Court of Small Causes of Rangoon, the Recorder of Rangoon shall be deemed to be the High Court within the meaning of this section.

8. If any party to, or witness in, any judicial proceeding offers to give evidence on oath or solemn affirmation in any form common amongst, or held binding by, persons of the race or persuasion to which he belongs, and not repugnant to justice or decency, and not purporting to affect any third person, the Court may, if it thinks fit, notwithstanding any thing hereinbefore contained, tender such oath or affirmation to him.

9. If any party to any judicial proceeding offers to be bound by any such oath or solemn affirmation as is mentioned in sec. 8, if such oath or affirmation is made by the other party to, or by any witness in, such proceeding, the Court may, if it thinks fit, ask such party or witness, or cause him to be asked, whether or not he will make the oath or affirmation :

Provided that no party or witness shall be compelled to attend personally in Court solely for the purpose of answering such question.

10. If such party or witness agrees to make such oath or affirmation, the Court may proceed to administer it, or if it is of such a nature that it may be more conveniently made out of Court, the Court may issue a Commission to any person to administer it, and authorize him to take the evidence of the person to be sworn or affirmed and return it to the Court.

11. The evidence so given shall, as against the person who offered to be bound as aforesaid, be conclusive poof of the matter stated.



12. If the party or witness refuses to make the oath or solemn affirmation referred to in sec. 8, he shall not be compelled to make it, but the Court shall record, as part of the proceedings, the nature of the oath or affirmation proposed, the facts that he was asked whether he would make it, and that he refused it, together with any reason which he may assign for his refusal.

Procedure in case of refusal to make oath.

#### V.—*Miscellaneous.*

13. No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth.

Proceedings and evidence not invalidated by omission of oath or irregularity.

14. Every person giving evidence on any subject before any Court or person hereby authorized to administer oaths and affirmations shall be bound to state the truth on such subject.

Persons giving evidence bound to state the truth.

15. The Indian Penal Code, secs. 178 and 181, shall be construed as if, after the word "oath," the words "or affirmation" were inserted.

Amendment of Penal Code, secs. 178 and 181.

16. Subject to the provisions of secs. 3 and 5, no person appointed to any office shall, before entering on the execution of the duties of his office, be required to make any oath, or to make or subscribe any affirmation or declaration whatever.

Official oaths abolished.

## F.

## 19 AND 20 VIC. CAP. 113.

*An Act to provide for taking evidence in Her Majesty's dominions in relation to civil and commercial matters pending before foreign tribunals, 29th July 1856.*

WHEREAS it is expedient that facilities be afforded for taking evidence in Her Majesty's dominions in relation to civil and commercial matters pending before foreign tribunals: Be it enacted—

1. Where, upon an application for this purpose, it is made to appear to any Court or Judge having authority under this Act, that any Court or tribunal of competent jurisdiction in a foreign country, before which any civil or commercial matter is pending, is desirous of obtaining the testimony in relation to such matter of any witness or witnesses within the jurisdiction of such first mentioned Court, or of the Court to which such Judge belongs, or of such Judge, it shall be lawful for such Court or Judge to order the examination upon oath, upon interrogatories or otherwise, before any person or persons named in such order, or such witness or witnesses accordingly; and it shall be lawful for the said Court or Judge, by the same order, or for such Court or Judge, or any other Judge having authority under this Act, by any subsequent order, to command the attendance of any person to be named in such order, for the purpose of being examined, or the production of any writings or other documents to be mentioned in such order, and to give all such directions as to the time, place and manner of such examination, and all other matters connected therewith, as may appear reasonable and just; and any such order may be enforced in like manner as an order made by such Court or Judge in a cause depending in such Court or before such Judge.

Order for examination of witnesses in this country in relation to any civil or commercial matter pending before a foreign tribunal.

2. A certificate under the hand of the ambassador, minister or other diplomatic Agent of any foreign power received as such by Her Majesty, or in case there be no such diplomatic Agent, then of the Consul-General or Consul of any such foreign power at London, received and admitted as such by Her Majesty, that any matter in relation to which an application is made under this Act is a civil or commercial matter pending before a Court or tribunal in the country of which he is the diplomatic Agent or Consul having jurisdiction in the matter so pending, and that such Court or tribunal is desirous of obtaining the testimony of the witness or witnesses to whom the application relates, shall be evidence of the matters so certified; but where no such certificate is produced, other evidence to that effect shall be admissible.

3. It shall be lawful for every person authorized to take the examination of witnesses by any order made in pursuance of this Act to take all such examinations upon the oath of the witnesses, or affirmation in case where affirmation is allowed by law instead of oath, to be administered by the person so authorized: and if upon such oath or affirmation any person making the same wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury.

4. Provided always, that every person whose attendance shall be so required shall be entitled to the like conduct money, and payment for expenses and loss of time, as upon attendance at a trial.

5. Provided also, that every person examined under any order made under this Act shall have the like right to refuse to answer questions tending to criminate himself, and other questions, which a witness in any cause

Certificate of ambassador, &c., sufficient evidence in support of application.

Examination of witnesses to be taken upon oath.

Person giving false evidence guilty of perjury.

Payment of expenses.

Persons to have right of refusal to answer questions and to produce documents.

pending in the Court by which or by a Judge whereof or before the Judge by whom the order for examination was made would be entitled to; and that no person shall be compelled to produce under any such order as aforesaid any writing or other document that he would not be compelled to produce at a trial of such a cause.

6. Her Majesty's Superior Courts of Common Law at Certain Courts and Judges to have authority under this Act. Westminster and in Dublin respectively, the Court of Sessions in Scotland, and any Supreme Court in any of Her Majesty's Colonies or possession abroad, and any Judge of any such Court, and every Judge in any such colony or possession who, by any order of Her Majesty in Council, may be appointed for this purpose, shall respectively be Courts and Judges having authority under this Act: provided, that the Lord Chancellor with the assistance of two of the Judges of the Courts of Common Law at Westminster shall frame such rules and orders as shall be necessary or proper for giving effect to the provisions of this Act, and regulating the procedure under the same.

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## G.

### 22 VIC. CAP. 20, EVIDENCE BY COMMISSION Act, 1859.

*An Act to provide for taking evidence in Suits and Proceedings pending before tribunals in Her Majesty's dominions in places out of the jurisdiction of such tribunal. The provisions of this Act apply to proceedings under the Evidence by Commission Act, 1835, 48 and 49 Vic. C. 74. See sec. 4 of the Act, 19th April 1859.*

WHEREAS it is expedient that facilities be afforded for  
Preamble. taking evidence in or in relation to actions, suits, and proceeding before tribunals in

Her Majesty's dominions in places in such dominions out of the jurisdiction of such tribunals: Be it enacted, &c.

1. Where, upon an application for this purpose, it is made to appear any Court or Judge having authority under this Act, that any Court or tribunal of competent jurisdiction in Her Majesty's dominions has duly authorized, by commission, order, or other process, the obtaining the testimony in or in relation to any action, suit or proceeding pending in or before such Court or tribunal, of any witness or witnesses out of the jurisdiction of such Court or tribunal, and within the jurisdiction of such first-mentioned Court, or of the Court to which such Judge belongs, or of such Judge, it shall be lawful for such Court or Judge to order the examination before the person or persons appointed, and in manner and form directed by such commission, order, or other process as aforesaid, of such witness or witnesses accordingly; and it shall be lawful for the said Court or Judge, by the same order, or for such Court or Judge or any other Judge having authority under this Act, by any subsequent order, to command the attendance of any person to be named in such order, for the purpose of being examined or the production of any writings or other documents to be mentioned in such order, and to give all such directions as to the time, place, and manner of such examination, and all other matters connected therewith, as may appear reasonable and just; and any such order may be enforced, and any disobedience thereof punished, in like manner as in case of an order made by such Court or Judge in a cause depending in such Court or before such Judge.

2. Every person examined as a witness under any such commission, order, or other process as aforesaid, who shall upon such examination wilfully and corruptly give any false evidence, shall be deemed and taken to be guilty of perjury.

3. Provided always, that every person whose attendance shall be so ordered shall be entitled to the like conduct money, and payment for expenses and loss of time, as upon attendance at a trial.

Payment of expenses.

4. Provided also, that every person examined under any such commission, order, or other process as aforesaid, shall have the like right to refuse to answer questions tending to criminate himself, and other questions which a witness in any cause pending in the Court by which, or by a Judge whereof, or before the Judge by whom the order for examination was made, would be entitled to, and that no person shall be compelled to produce under any such order as aforesaid any writing or other document that he would not be compellable to produce at a trial of such a cause.

Power to person to refuse to answer questions to criminate himself, or to produce documents.

5. Her Majesty's Superior Courts of Common Law at Westminster and in Dublin respectively, the Court of Session in Scotland, and any Supreme Court in any of Her Majesty's colonies or possessions abroad, and any Judge of any such Court, and every Judge in any such colony or possession who, by any order of Her Majesty in Council, may be appointed for this purpose, shall respectively be Courts and Judges having authority under this Act.

Certain Courts and Judges to have authority under this Act.

6. It shall be lawful for the Lord Chancellor of Great Britain, with the assistance of two of the Judges of the Courts of Common Law at Westminster, so far as relates to England, and for the Lord Chancellor of Ireland, with the assistance of two of the Judges of the Courts of Common Law at Dublin, so far as relates to Ireland, and for two of the Judges of the Court of Session, so far as relates to Scotland, and for the Chief or only Judge of the Supreme Court in any of Her Majesty's colonies or possessions abroad, so far as relates to such colony or possession, to frame such\*

\* By sec. 5 of the Evidence by Commission Act, 1885, 48 and 49 Vic. C. 74, the power to make rules under this section includes a power to make rules as to all cost of or incidental to the examination of any witness or person, including the remuneration of the examiner, if any, whether the examination be permanent to the Evidence Commission Act, 1859, or any other Act in force for the examination of witnesses beyond the jurisdiction of the Court.

rules and orders as shall be necessary or proper for giving effect to the provisions of this Act and regulating the procedure under the same.

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## H.

### 48 AND 49 VIC. CAP. 74, EVIDENCE BY COMMISSION ACT, 1885.

*An Act to amend the Law relating to taking Evidence by Commission in India and the colonies, and elsewhere in Her Majesty's Dominions, 14th August 1885.*

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

1. This Act may be cited as the Evidence by Commission Short title. Act, 1885.

2. Where in any civil proceeding in any Court of competent jurisdiction an order for the examination of any witness or person has been made, and a commission, mandamus, order or request for the examination of such witness or person is addressed to any Court, or to any Judge of a Court, in India or the Colonies, or elsewhere in Her Majesty's dominions, beyond the jurisdiction of the Court ordering the examination, it shall be lawful for such Court, or the Chief Judge thereof, or such Judge, to nominate some fit person to take such examination, and any deposition or examination taken before an examiner so nominated shall be admissible in evidence to the same extent as if it had been taken by or before such Court or Judge.

Power to Courts  
to nominate ex-  
aminer in civil  
proceedings.

3. Where in any criminal proceedings a mandamus or order for the examination of any witness or person is addressed to any Court, or to any Judge of a Court, in India or the colonies, or elsewhere in Her Majesty's dominions,

Power in criminal  
proceedings to  
nominate Judge  
or Magistrate to  
take depositions.

beyond the jurisdiction of the Court ordering the examination, it shall be lawful for such Court, or the Chief Judge thereof, or such Judge, to nominate any Judge of such Court, or any Judge of an inferior Court, or Magistrate within the jurisdiction of such first-mentioned Court, to take the examination of such witness or person, and any deposition or examination so taken shall be admissible in evidence to the same extent as if it had been taken by or before the Court or Judge to whom the mandamus or order was addressed.

4. The provisions of the Act passed in the twenty-second year of Her Majesty, chapter twenty, intituled "An Act to provide for taking evidence in suits and proceedings pending before tribunals in Her Majesty's dominions in places out of the jurisdiction of such tribunals" (which may be cited as the Evidence by Commission Act, 1859), as amended by this Act, shall apply to proceedings under this Act.

Application of 22 Vic. C. 20, as to conduct money, &c., to proceedings under this Act.

5. The power to make rules conferred by section six of the Evidence by Commission Act, 1859, shall be deemed to include a power to make rules with regard to all costs of or incidental to the examination of any witness or person, including the remuneration of the examiner, if any, whether the examination be ordered pursuant to that Act or under this or any other Act for the time being in force relating to the examination of witnesses beyond the jurisdiction of the Court ordering the examination.

Amendment of 22 Vic. C. 20, as to costs.

6. When, pursuant to any such commission, mandamus, order, or request as in this Act referred to, any witness or person is to be examined in any place beyond the jurisdiction of the Court ordering the examination, such witness or person may be examined on oath, affirmation, or otherwise, according to the law in force in the place where the examination is taken, and any

Oath or affirmation of witness.



deposition or examination so taken shall be as effectual for all purposes as if the witness or person had been examined on oath before a person duly authorized to administer an oath in the Court, ordering the examination.

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# I.

## 22 AND 23 VIC. CAP. 63.

*An Act to afford facilities for the more certain ascertainment of the law administered in one part of Her Majesty's dominions when pleaded in the Courts of another part thereof, 13th August 1895.*

WHEREAS great improvement in the administration of the law would ensue if facilities were afforded for more certainly ascertaining the law administered in one part of Her Majesty's dominions when pleaded in the Courts of another part thereof: Be it therefore enacted, &c.

1. If, in any action depending in any Court with Her Majesty's dominions, it shall be the opinion of such Court, that it is necessary or expedient, for the proper disposal of such action, to ascertain the law applicable to the facts of the case as administered in any other part of Her Majesty's dominions on any point on which the law of such other part of Her Majesty's dominions is different from that in which the Court is situate, it shall be competent to the Court in which such action may depend to direct a case to be prepared setting forth the facts as these may be ascertained by verdict of a jury or other more competent, or as may be agreed upon by the parties, or settled by such person or persons as may have been appointed by the Court for that purpose in the event of the parties not agreeing; and upon such case being approved of by such Court or a Judge thereof, they shall settle the questions of law arising out of the same on which they desire to have the opinion of another Court,

Courts in one part of Her Majesty's dominions may remit a case for the opinion in law of a Court in any other part thereof.

and shall pronounce an order remitting the same, together with the case, to the Court in such other part of Her Majesty's dominions, being one of the Superior Courts thereof, whose opinion is desired upon the law administered by them as applicable to the facts set forth in such case, and desiring them to pronounce their opinion on the questions submitted to them in the terms of the Act; and it shall be competent to any of the parties to the action to present a petition to the Court whose opinion is to be obtained, praying such last-mentioned Court to hear parties or their counsel, and to pronounce their opinion thereon in the terms of this Act, or to pronounce their opinion without hearing parties or counsel; and the Court to which such petition shall be presented, shall, if they think fit, appoint an early day for hearing parties or their counsel on such case, and shall thereafter pronounce their opinion upon the questions of law as administered by them which are submitted to them by the Court; and in order to their pronouncing such opinion, they shall be entitled to take such further procedure thereupon as to them shall seem proper.

2. Upon such opinion being pronounced, a copy thereof,   
Opinion to be authenticated and certified copy given. certified by an officer of such Court, shall be given to each of the parties to the action by whom the same shall be required, and shall be deemed and held to contain a correct record of such opinion.

3. It shall be competent to any of the parties to the action, after having obtained such certified copy of such opinion, to lodge the same with an officer of the Court in which the action may be depending, who may have the official charge thereof, together with a notice of motion, setting forth that the party will, on a certain day named in such notice, move the Court to apply the opinion contained in such certified copy thereof to the facts set forth in the case hereinbefore specified, and the said Court shall

thereupon apply such opinion to such facts, in the same manner as if the same had been pronounced by such Court itself upon a case reserved for opinion of the Court, or upon special verdict of a jury; or the said last-mentioned Court shall, if it think fit, when the said opinion has been obtained before trial, order such opinion to be submitted to the jury

Opinion to be applied by the Court making the remit. with the other facts of the case as evidence, or conclusive evidence as the Court may think fit, of the foreign law therein stated, and the said opinion shall be so submitted to the jury.

4. In the event of an appeal to Her Majesty in Council or to the House of Lords in any such action, it shall be competent to bring under review of Her Majesty in Council or of the House of Lords the opinion pronounced as afore-said by any Court whose judgments are reviewable by Her Majesty in Council or by the House of Lords, and Her Majesty in Council or that House may respectively adopt or reject such opinion of any Court whose judgments are respectively reviewable by them, as the same shall appear to them to be well-founded or not in law.

5. In the construction of this Act, the word "action" shall include every judicial proceeding instituted in any Court, Civil, Criminal or Ecclesiastical; and the words "Superior Courts" shall include, in England, the Superior Courts of Law at Westminster, the Lord Chancellor, the Lords Justices, the Master of the Rolls, or any Vice-Chancellor, the Judge of the Court of Admiralty, the Judge Ordinary of the Court for Divorce and Matrimonial Causes, and the Judge of the Court of Probate; in Scotland, the High Courts of Justiciary, and the Court of Session, acting by either of its divisions; in Ireland, the Superior Courts of Law at Dublin, the Master of the Rolls, and the Judge of Admiralty Court, and in any other part of Her Majesty's dominions, the Superior Courts of Law or Equity therein.

## J.

## 24 VIC. CAP. 11.

*An Act to afford facilities for the better ascertainment of the law of foreign countries when pleaded in Courts within Her Majesty's dominions, 17th May 1861.*

WHEREAS an Act was passed in the twenty-second and twenty-third years of Her Majesty's reign, Preamble, 22 and 23 Vic. C. 63. intituled an Act to afford facilities for the more certain ascertainment of the law administered in one part of Her Majesty's dominions when pleaded in the Courts of another part thereof. And whereas it is expedient to afford the like facilities for the better ascertainment, in similar circumstances, of the law of any foreign country or State with the government of which Her Majesty may be pleased to enter into a convention for the purpose of mutually ascertaining the law of such foreign country or State when pleaded in actions depending in any Courts within Her Majesty's dominions and the law as administered in any part of her Majesty's dominions when pleaded in actions depending in the Courts of such foreign country or State: Be it therefore enacted, &c.

1. If, in any action depending in any of the Superior Courts within Her Majesty's dominions, it shall be the opinion of such Court, that it is necessary or expedient, for the disposal of such action, to ascertain the law applicable to the facts of the case as administered in any foreign State or country with the government of which Her Majesty shall have entered into such convention as aforesaid, it shall be competent to the Court in which such action may depend to direct a case to be prepared setting forth the facts as these may be ascertained by verdict of a jury or other mode competent, or as may be agreed upon by the parties, or settled by such person or persons as may have been appointed by the Court for that

purpose in the event of the parties not agreeing; and upon such action being approved of by such Court or a Judge thereof, such Court or Judge shall settle the questions of law arising out of the same on which they desire to have the opinion of another Court, and shall pronounce an order remitting the same, together with the case, to such Superior Court in such foreign State or country as shall be agreed upon in said convention, whose opinion is desired upon the law administered by such foreign Court as applicable to the facts set forth in such case, and requesting them to pronounce their opinion on the question submitted to them; and upon such opinion being pronounced, a copy thereof certified by an officer of such Court, shall be deemed and held to contain a correct record of such opinion.

2. It shall be competent to any of the parties to the Court in which action depends to apply such opinion to the facts set forth in cases, &c. action, after having obtained such certified copy of such opinion, to lodge the same with officer of the Court within Her Majesty's dominion in which the action may be depending, who may have the official charge thereof, together with a notice of motion, setting forth that the party will, on a certain day named in such notice, move the Court to apply the opinion contained in such certified copy thereof to the facts set forth in the case hereinbefore specified, and the said Court shall thereupon, if it shall see fit, apply such opinion to such facts, in the same manner as if the same had been pronounced by such Court itself upon a case reserved for opinion of the Court, or upon special verdict of a jury; or the said last mentioned Court shall, if it think fit, when the said opinion has been obtained before trial, order such opinion to be submitted to the jury with the other facts of the case as conclusive evidence of the foreign law therein stated, and the said opinion shall be so submitted to the jury: Provided always, that if after having obtained such certified copy, the Court shall not be satisfied that the facts had been properly understood by the foreign Court to which the case was remitted, or shall, on

any ground whatsoever, be doubtful whether the opinion so certified does correctly represent the foreign law as regards the facts to which it is to be applied, it shall be lawful for such Court to remit the said case, either with or without alterations or amendments, to the same or to any other such Superior Court in such foreign State as aforesaid and so from time to time as may be necessary or expedient.

3. If, in any action depending in any Court of a foreign country or State with whose government Her Majesty shall have entered into a convention as about set forth, such Court shall deem it expedient to ascertain the law applicable to the facts of the case as administered in any part of Her Majesty's dominions, and if the foreign Court in which such action may depend shall remit to the Court in Her Majesty's dominions whose opinion is desired a case setting forth the facts and the questions of law arising out of the same on which they desire to have the opinion of a Court within Her Majesty's dominions, it shall be competent to any of the parties to the action to present a petition to such last mentioned Court, whose opinion is to be obtained, praying such Court to hear parties or their council, and to pronounce their opinion thereon in terms of this Act or to pronounce their opinion without hearing parties or counsel; and the Court to which such petition shall be presented shall consider the same, and if they think fit, shall appoint an early day for hearing parties or their counsel on such case, and shall pronounce the opinion upon the questions of law as administered by them which are submitted to them by the foreign Court; and in order to their pronouncing such opinion, they shall be entitled to take such further procedure thereupon as to them shall seem proper, and upon such opinion being pronounced, a copy thereof, certified by an officer of such Court, shall be given to each of the parties to the action by whom the same shall be required.

Courts in Her Majesty's dominions may pronounce opinion on case remitted by a foreign Court.

4. In the construction of this Act, the word "action" shall include every judicial proceeding instituted in any Court, Civil, Criminal or Ecclesiastical; and the words "Superior Courts" shall include, in England, the Superior Courts of Law at Westminster, the Lord Chancellor, the Lords Justices, the Master of the Rolls, or any Vice-Chancellor, the Judge of the Court of Admiralty, the Judge Ordinary of the Court for Divorce and Matrimonial Cause, and the Judge of the Court of Probate; in Scotland, the High Court of Justiciary, and the Court of Session, acting by either of its divisions; in Ireland, the Superior Courts of Law at Dublin, the Master of the Rolls, and the Judge of the Admiralty Court, and in any other part of Her Majesty's dominions, the Superior Courts of Law or Equity therein; and in a foreign country or State, any Superior Court or Courts which shall be set forth in any such convention between Her Majesty and the Government of such foreign country or State.

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## ADDENDA.

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**Sections 8 and 9—(a).** In the case of *The Collector of Gorakhpur v. Palakdhari Singh*, I. L. R. 12 All. (F. B.) 1, the majority of the Full Bench held that judgment in criminal cases, not *inter partes*, are not relevant, as showing a motive or preparation within the meaning of sec. 8, nor are they relevant under sec. 9, as they do not come within the words "which establish the identity of any thing or person whose identity is relevant," nor would they be relevant as facts necessary to explain or introduce any fact in issue or relevant fact.

(b). One of the questions in issue in a suit as to the pedigree of a certain family being whether one Gauri Shankar was son of Balwant Singh or of one Moajjam Singh, belonging to a totally different family from that of Balwant Singh, an attested copy of a rubkari in some proceedings, long anterior to the suit, was tendered in evidence, in which rubkari Gauri Shankar was described as the son of Balwant Singh. *Held*, that the rubkari was admissible in evidence under the provisions of section 8—*Radhan Singh v. Kuraji Dichhit*, I. L. R. 18 All. 98.

**Sections 11 and 13.—(a).** A zemindar claimed the proprietary right and possession of *mouzas*, within the limits of his zemindary, against tenants, who, by themselves and their predecessors in title, had held the land from before the decennial settlement in Bengal, an unvaried rent having been paid to the zemindar. The first defendant alleged a grant to his ancestor of a *mokurari* tenure by a ghatwal then holding land within the zemindary; the other defendants alleged title as *dur-mokuraridars* under the first. Certain decrees were pronounced in proceedings at the instance of D, the son of G, by whom the original grant is alleged to have been made, against persons in possession of the *mouzas* in question, predecessors of certain of the respondents, the first dated in 1817, and the second in 1845. In the first of these cases, which originated in 1811, the plaintiff, describing himself as owner of the ancestral ghatwali property of the *taluk* Karoya, claimed recovery of possession of the villages, now in question, from the persons then in possession. The defence was that G, the father of the plaintiff D, had granted permanent rights of ghatwali tenure at fixed rents amounting to Rs. 35, and that possession had followed, and the ghatwali duties

had been continuously performed, so that possession could not be decreed in the plaintiff's favour. The suit for possession was dismissed, but with leave to bring another suit for assessment of rent; but a decree was therein given for the arrears of rent for the past years, and for future rents at the rate of Rs. 35, which had been 'hitherto paid.' The subsequent suit for assessment of rent was instituted in 1842. The defence in the former case was repeated. It was maintained that the defendants held, under permanent rights of ghatwali tenure, at a fixed rent, and for performance of police duties, and that he had fulfilled these obligations; and that in such a case no assessment or enhancement of rent could be given, and this defence was sustained, and the action was dismissed in 1845. As regards the admissibility of these decrees, the Judges of the Calcutta High Court said: "As regards the admissibility of the judgments to which exception has been taken, we observe that the lower Appellate Court has only used these judgments as evidence, that there was litigation between the parties thereto at the dates to which they relate. It uses those judgments to show that at those dates the so-called ghatwal was suing the so-called *mokuraridar* respecting the villages in suit, and that in those suits the parties asserted the same rights which they now assert. To this extent, we think, that the judgments were admissible in evidence, even though the zemindar was no party to them." Their Lordships of the Privy Council remarked: "It must be observed that by the judgment of 1817 a decree for rent of the *mousas*, now in question, was given at the rate of Rs. 5 *per annum*, against the predecessors of the respondents. Their Lordships are of opinion that, although the predecessor of the Raja was no party to that litigation, it was competent to use the judgment as evidence showing that the rent paid for the possession at and prior to that date, now nearly eighty years ago"—*Ramranjan Chakerbati v. Ram Narain Singh*, I. L. R. 22 Cal. 533.

(b). In the case of *Bai Baiji v. Bai Santok*, I. L. R. 20 Bom. 53, it was held that decrees of competent Courts are good evidence in matters of public interest, such as the existence of customs of succession in particular communities. Such decisions form an exception to the general rule, which excludes *res inter alios acta*.

**Sections 17 and 18.**—In the case of *Raja Goundan v. Raja Goundan*, I. L. R. 17 Mad. 134, a horoscope, which has been a public record from a period *ante litem motam*, was admitted, under secs. 17 and 18, as evidence of admission. *Vide p. 135 post*.

**Sections 24 and 30.**—(a). Two persons, J and U, were charged with the murder of U's husband, and in the course of the police enquiry made certain statements to the police. They were then sent up by

the police to a Deputy Magistrate for enquiry. J made three statements, on the 28th of February, the 1st of March, and the 9th of March 1894, respectively, two of which were confessions, the third being a withdrawal of such confessions. U also made two statements on the 2nd and 9th of March, the first of which was a confession, and the second a withdrawal thereof. On the 24th of April, U was tendered a pardon, and was thereafter treated as an approver, in which capacity she gave evidence against J. J was then committed to the Court of Sessions to take his trial, U being sent up as an approver. In the Sessions Court U resiled from her deposition before the committing Magistrate, and was then and there treated as an accused person, and placed on her trial with the other accused, and the deposition afore said was put in as evidence. Both accused were convicted mainly on their confessions, J of murder, and U of abetment of murder. *Held*, that the conviction of J was bad.

(1). Because U's statement to the police was not admissible in evidence.

(2). Because her statements on the 2nd and 9th of March were not, under the circumstances, admissible in evidence, as she was not being legally tried jointly with him for the same offence.

(3). That her deposition on the 24th of April was not admissible in evidence, because, apart from other reasons, J had no opportunity to cross-examine her.

(4). Because J's confession, under the circumstances, was not a free and voluntary admission of guilt—*Queen-Empress v. Jagat Chundra Mali*, I. L. R. 22 Cal. 50.

**Sections 25 and 26.**—(a). A statement made to a police officer by an accused person while in the custody of the police, if it is an admission of a criminating circumstance, cannot be used in evidence under secs. 25 and 26—*Queen-Empress v. Javecharam*, I. L. R. 19 Bom. 363.

(b). A person, under arrest on a charge of murder, was taken in a tonga, from the place where the alleged offence was committed, to Godhra. A friend drove with her in the tonga, and a mounted policeman left the tonga, and went to a neighbouring village to procure a fresh horse, the tonga meanwhile proceeding slowly along the road for some miles without any escort. In the absence of the policeman, the accused made a communication to her friend with reference to the alleged offence. At the trial it was proposed to ask what the prisoner had said, on the ground that she was not then in custody, and that sec. 26 did not apply. *Held*, that, notwithstanding the temporary absence of the policeman, the accused

was still in custody, and the question must be disallowed—*Empress v. Lester*, I. L. R. 20 Bom. 165.

**Section 30.**—(a). A and D were charged with murder. A pleaded guilty, but he was not convicted or sentenced till the conclusion of the trial of his fellow-prisoner B. The Sessions Judge, holding that both the accused were jointly tried for the same offence, took into consideration as against B the confessions made by A, and convicted both of murder. *Held*, that after A had pleaded guilty, he could not be treated as being jointly tried with B. A's confessions were, therefore, not admissible against B under this section—*Queen-Empress v. Pakuji*, I. L. R. 19 Bom. 195.

(b). Where two, out of several persons on their trial in a Court of Session on a joint charge, pleaded guilty and made certain statements to the Court, it was held that such statements could not be taken into consideration as evidence against the other accused persons, inasmuch as, after pleading guilty, the persons making those statements were no longer on their trial—*Queen-Empress v. Pirbhu*, I. L. R. 17 All. 524.

(c). *Vide The Deputy Legal Remembrancer v. Karuna Baistobi*, I. L. R. 22 Cal. 164.

(d). By Act III of 1891 an explanation to the following effect is appended to this section: "offence, as used in this section, includes the abetment of, or attempt to commit, the offence."

(e). A retracted confession, if proved to be voluntarily made, can be acted upon along with the other evidence in the case. There is no rule of law that a retracted confession must be supported by independent reliable evidence corroborating it in material particulars. The use to be made of such a confession is a matter of prudence rather than of law—*Queen-Empress v. Gharya*, I. L. R. 19 Bom. 728.

(f). It is unsafe for a Court to rely on and act upon a confession which has been retracted, unless, upon a consideration of the whole evidence in the case, the Court is in a position to come to the unhesitating conclusion that the confession is true, that is to say, usually, unless the confession is corroborated by credible independent evidence—*Queen-Empress v. Mahabir*, I. L. R. 18 All. 78.

**Section 32.**—In the case of *Bejai Bahadur Singh v. Bhupendar Bahadur Singh*, I. L. R. 17 All. (P. C.) 456, the claimant, to prove his title, relied upon a pedigree, not stated in any document, produced, that had existed in the family before this suit. The genealogy on which he claimed was, however, identical with one which his father had more than once asserted, alleging title to two mouzas of the Raj estate, the Raja, called upon to answer in proceedings at settlement,

had not given a direct denial to the alleged relationship. *Held*, that the evidence taken altogether, oral and documentary, had been sufficient to prove that the appellant was related to the deceased Raja, as he had claimed to be, and that the appellant was, as heir to him, entitled to inherit the Raj estates, on the widow's death; this opinion being founded on the documentary evidence.

**Section 33.**—(a). Commissions in criminal cases are not to be issued without good and sufficient reasons: the discretion is judicial as shown by the Indian cases and the practice of the Courts of England—*In re Boyse*, *Crofton v. Crofton*; *Coch v. Allcock & Co.* The exercise of the discretion is open to reconsideration in appeal as shown by *Queen v. Mowjan and Cleave v. Jones*, Taylor on Evidence, sec. 22. But depositions taken on commission in criminal cases, although inadmissible under Chap. 40 of the Criminal Procedure Code (Act X of 1882), may be admitted under sec. 33 of the Act, if the requirements of the proviso to this section have been complied with. The words 'opportunity to cross-examine' in the proviso to this section do not imply that the actual presence of the cross-examining party or his agent before the tribunal taking the evidence is necessary. To make evidence admissible against an accused person, the fact that he had full opportunity of cross-examination, if not admitted, must be proved—*Queen-Empress v. Ramchandra Govind Harshe*, I. L. R. 19 Bom. 749.

(b). A prosecution was instituted by S against N, at the instance and on behalf of F, for criminal trespass in respect of a certain house, and on his own behalf for assault and insult. S gave evidence at the trial in support of these charges. F subsequently brought a civil suit against N for possession of the same house under sec. 9 of the Specific Relief Act. S died before the institution of the civil suit. At the trial of the civil suit the deposition of S in the Criminal Court was tendered by F as evidence on the issue of possession. *Held*, that S being dead, and the proceeding being between the same parties, and the issue being substantially the same, the deposition of S was admissible—*Foolkissory Dassees v. Nobin Chunder Bhunjo*, I. L. R. 23 Cal. 441.

**Section 34.**—(a). In the case of *Jaswant Singh v. Sheo Narain Lal*, I. L. R. 16 All. (P. C.) 157, their Lordships of the Privy Council, after saying that some accounts may be so kept, and may so tally with external circumstances as to carry conviction that they are true, remarked: "And the Evidence Act, sec. 34, therefore enacts that entries in books of account regularly kept in the course of business shall be relevant evidence, though not sufficient of themselves to charge any person with liability." As to the facts of the case, their

Lordships said : " There is a cash-book, a bill-book, and a ledger, all referring to one another. Tracing some items through the extracts, their Lordships find the correspondence between the books to be exact, and there is no suggestion made that any discrepancy exists. It must be confessed that to forge elaborate accounts extending over six years, or even to insert new sheets in such accounts, would be a most dangerous undertaking, and to make the different books correspond exactly would be a task of almost insuperable difficulty. But there is even a better test of the genuineness than the correspondence of the books with themselves, and that is their correspondence with other evidence."

(b). In a suit to recover money due upon a running account, the plaintiff produced his account-books, which were found to be books regularly kept, in the course of business, in support of his claim. One of the plaintiffs gave evidence as to the entries in the account-books, but in such a manner that it was not clear whether he spoke from his personal knowledge of the transaction entered in the books, the entries in which were largely in his own handwriting, or simply as one describing the state of affairs that was shown by the books. He was cross-examined, but no questions were asked him to show that he was not speaking as to his personal knowledge. *Held*, that the evidence given as above should be interpreted in the manner most favourable to the plaintiff, and might be accepted in support of the entries in the plaintiff's account-books, which, by themselves, would not have been sufficient to charge the defendants with liability — *Dwarka Das v. Sant Baksh*, I. L. R. 18 All. 92.

**Section 35.**—(a). In the case of *Krishnasami Ayyangar v. Raja Gopala Ayyangar*, I. L. R. 18 Mad. 73, their Lordships of the Madras High Court observed : " Copies of judgments and decrees were there (*Subramanyan v. Paramaswaran*, 11 Mad. 116), held to be inadmissible with reference to the decision of the majority of Judges of the Calcutta High Court in *Gujju Lall v. Fatteh Lall* (6 Cal. 171). As pointed out by this Court in *Byathamma v. Avulla* (15 Mad. 19) was to show that in another suit against another defendant the plaintiff had obtained an adjudication in his favour on the same right ; and it was held that the opinion expressed in the former judgment was not a relevant fact within the meaning of the Evidence Act. The case is clearly different where the previous judgment is produced, not in order to prove an adjudication between third parties, but in order to prove a statement made by a predecessor in title of the party against whom the document is sought to be used ; *c. f.* *Parbutty Dassi v. Purna Chundra Singh* (9 Cal. 586) and *Thama v. Kondan* (15 Mad. 378), such is the case here, and we have no doubt that the

judgments in question are relevant under sec. 35 of the Evidence Act."

(b). The teiskhana paper kept by patwaris under sec. 16 of Bengal Regulation XII of 1817 is not a public register or record within the meaning of this section, and is not admissible as evidence—*Samar Dasadh v. Juggal Kishore Singh*, I. L. R. 23 Cal. 366.

**Sections 36 and 83.**—A map made by a Deputy Collector for the purpose of the settlement of land forming the silted bed of a river is not one which is admissible in evidence, under this section and sec. 83; but it is a map, the accuracy of which must be proved before it can be admitted in evidence. The contention that the map was admissible in evidence was held to be open to the appellant on second appeal, although he had not appealed against an order of remand made by the lower Appellate Court, rejecting the map as not being admissible—*Kanto Prashad Hazari v. Jagut Chundra Dutta*, I. L. R. 23 Cal. 335.

**Section 40.**—(a). An entry of a record prepared under sec. 108 of the Land Revenue Code, Bombay Act V of 1879, by the survey officer, describing certain lands as *khoti* is by force of sec. 17 of the Khoti Act, Bombay Act I of 1880, conclusive, and final evidence of the liability thereby established, and shuts out the evidence of a prior decision otherwise relevant under sec. 40 of this Act as proof of *res judicata*, whereby a Civil Court adjudged the land to be *dhara*—*Ram Chundra v. Raghunath*, I. L. R. 20 Bom. 475.

(b). *Autrefois convict.*—A conviction for breach of contract of service under sec. 2, Act XIII of 1859, is a bar to any subsequent conviction on the same contract for a further breach for not returning to service—*Griffiths v. Texia Dasadh*, I. L. R. 21 Cal. 262.

**Sections 42 and 43.**—In a suit by the landlords to avoid the sale of an occupancy holding in their mouza, and eject the purchaser thereof, one of the questions was as to the existence of a custom or usage under which the ryot was entitled to sell such a holding. *Held*, with reference to the expressions 'custom or usage' in sec. 183 and 'local usage' in cl. d, sub-sec. 3, sec. 178 of the Bengal Tenancy Act (VIII of 1885): (1) the word 'usage' would include what the people are now or recently in the habit of doing in a particular place; (2) in deciding on the evidence of such a custom or usage, regard should be had to sec. 48 of the Evidence Act; (3) a judgment of the High Court as to the transferability of similar tenures in an adjoining village of the same pergunnah is admissible as evidence of such usage under sec. 42 of the Evidence Act—*Dalglish v. Gurusfer Hassain*, I. L. R. 23 Cal. 427.

**Section 43.—Admissibility of Civil Judgment in Criminal Trial.—**

In the case of *Rajkumari Debi v. Bama Sundari Debi*, I. L. R. 23 Cal. 610, Rampini J. said, that "It is a well-known rule of evidence that a judgment in a criminal case cannot be received in a civil action to establish the truth of the facts upon which it is rendered, and that a judgment in a civil action cannot be given in evidence for such a purpose in a criminal prosecution (Taylor on Evidence, 8th Ed., 1693). Ghose J. held that the decision in a civil suit would be admissible in evidence in a criminal case, if the parties are substantially the same and the issues in the two cases are identical.

**Section 44.**—A party to a proceeding is never disabled from showing that a judgment or order has been obtained by the adverse party by fraud—*Manchparam v. Kalidas*, I. L. R. 19 Bom. 821.

**Section 68.**—(a). A deed of mortgage for more than Rs. 100, which has been prepared and accepted, but which is not attested, is invalid, as it is excluded by the provisions of sec. 68, since it purports to create a legal mortgage—*Madras Deposit and Benefit Society, Ltd. v. Donnamalai Ammal*, I. L. R. 18 Mad. 29.

**Section 92.**—Sec. 92 will not debar a party to a contract in writing from showing notwithstanding the recitals in the deed that the consideration specified in the deed was not in fact paid as therein recited, but was agreed to be paid in a different manner—*Indrajid v. Lal Chand*, I. L. R. 18 All. 168.

**Section 92, Proviso (6), Wager.**—In the case of *Eshoor Dass v. Vankata Subba Rao*, I. L. R. 17 Mad. 480, it was held that the burden of proof that the agreements were wagers, i.e., (1) that they were not in substance what they were in form, lay on A, as the party so alleging; (2) that oral evidence is admissible to show that an agreement in writing to sell is really only an agreement by way of wager. (*Anupchand Hemchand v. Champai Ugerchand*, 12 Bom. 585, followed; *Juggernath Sew Bux v. Ram Dyal*, 9 Cal. 791, dissented from).

**Section 103.**—(a). When the amount of the policy is claimed by the administrators of a person who insured his life, and gave no evidence of his age during his lifetime, it lies upon those claiming upon the policy by reasonable proof to satisfy the Court as to the age of the assured. If any innocent mistake as to age on the part of the assured is disclosed, the policy would not be vitiated—*Oriental Government Security Life Assurance Company v. Sarat Chunder Chatterji*, I. L. R. 20 Bom. 99.

(b). In the case of *Ram Ghulam Singh v. Ram Behary Singh*, I. L. R. 18 All. 90, as the plaintiffs set up a case which was incon-



sistent with the presumption of the family remaining joint, it was held that it was for them to prove that the separation took place as they alleged.

(c). The burden of proof in suits for malicious prosecution lies on the plaintiff not only to allege in the plaint, but also to prove against the defendant malice and absence of reasonable and probable cause for the information given by him to the police—*Raghavendra v. Kashinath Bhat*, I. L. R. 19 Bom. 717.

(d). In an ejectment suit, the defendant, though a trespasser, is entitled to require the plaintiff, who seeks to eject him, to prove that he has a superior title—*Kalu Valad Vishnu v. Barsu Valad Zendu*, I. L. R. 19 Bom. 803.

**Section 106.**—In the case of *The Deputy Legal Remembrancer v. Karuna Baistobi*, I. L. R. 22 Cal. 164, it was held that having regard to the provisions of sec. 106, ill. (a), and to the fact that there was evidence, apart from the confessions, which tended to show the knowledge and intention which the character and circumstances of the act suggested, the *onus* lay on K to show that the intention was other than that which the act suggested, or that the employment of the girls as prostitutes was not intended till after they had attained the age of 16 years. This was a case in which one H, the father of two girls, twins, about a year old, sold one of them to K, a prostitute, and within ten days of such sale also sold her the other. K was shown to have previously purchased another child whom she had brought up from her infancy, and who was then living with her and leading the life of a prostitute. H was charged with an offence under sec. 372, and K with an offence under sec. 373 of the Indian Penal Code, and the question was whether the minors were purchased with the intention that they were to be used for the purpose of prostitution at some definite future time.

**Section 114, ill. (c).**—Professional money-lenders sued a young man recently come of age to recover certain loans of money alleged to have been advanced by them to him on promissory notes. The defendants, who, under the will of his father, was entitled to a large property, but had not yet come into possession of it, was of an extravagant and reckless character. He pleaded, as to part of the consideration for the notes, that he did not receive it, and as to a further part, that the consideration was immoral. In dealing with the case, the Court laid down the following propositions, not as rules of law, but as guides in considering the evidence in such a case :—

1. That, upon the above facts, the ordinary presumption that a negotiable instrument has been executed for value received was so

much weakened that the defendant's allegation that he had not received full consideration was sufficient to shift the burden of proof and to throw upon the money-lenders (the plaintiffs) the obligation of satisfying the Court that they had paid the consideration in full. That is the practical effect of ill. (c) to sec. 114 of the Act.

2. That the plaintiff, in answer to such a defence, affirmed that he had paid the consideration in full, and was corroborated by his books and witnesses, the *onus* of proof again shifted over upon the defendant.

3. The burden of proof thus thrown upon the defendant could not only be met by a perfectly truthful and harmonious statement which the Court felt able to rely upon with confidence. In the absence of this, the ordinary presumption laid down in sec. 118 of the Negotiable Instrument Act (XXVI of 1881) must prevail, *viz.*, until the contrary is proved, the presumption should be made that every negotiable instrument was made for consideration—*Moti Gulabchand v. Mahomed Mehdi Tharia Zopan*, I. L. R. 20 Bom. 367.

**Section 114.—Presumptions of Hindu Law.**—(a). Where there has existed a joint Hindu family possessed as such of immoveable property, the presumption is that, until the contrary is shown, such family will continue to be joint. The fact that in the revenue and village papers, individual members of Hindu family, once admittedly joint, are recorded as holding each a certain specified portion of property is not, standing by itself, sufficient evidence that a separation has taken place, nor is the fact that specific purchases of immoveable property have been made from time to time in the names of individual members of the family, and that the property, as purchased, was recorded in each case in the name of the nominal assignee—*Gajender Singh v. Sardar Singh*, I. L. R. 18 All. 176.

(b). Where a plaintiff's family is admitted or proved to be a joint Hindu family, but there is no direct evidence as to the nature of the debt claimed by the plaintiff, the presumption is that it is a family debt—*Jagmohandas v. Allu Maria Duskal*, I. L. R. 19 Bom. 338.

**Section 115.—Estoppel by Conduct.**—(a). *Vide* (1) *Trihhobandas Mangaldas v. Yorke Smith*, I. L. R. 20 Bom. 317; (2) *Manchharam v. Kalidas*, I. L. R. 19 Bom. 821.

(b). In the case of *The Madras Hindu Mutual Benefit Permanent Fund v. Ragava Chetti*, I. L. R. 19 Mad. 200, it was held that the defendants were not estopped from setting up the plea of illegality.

**Section 115.—Suit by Benamidar.**—A benamidar, suing for the recovery of immoveable property on title, can sue in his own name, and when such a suit is instituted by a benamidar, it must be held

to have been instituted with the consent and approval of the beneficiary, against whom any adverse decision on the title set up will take effect as a *res judicata*—*Nand Kisore Lal v. Ahmad Ata*, I. L. R. 18 All. 69.

**Section 133.**—Where witnesses appeared to have taken an active part in carrying away a person after he had been grievously assaulted and was in a helpless condition, and then leaving him in a field where he was subsequently found dead, *held*, that their evidence was no better than that of accomplices; at any rate, it would be most unsafe for the Court to rely upon their evidence, unless corroborated in material respects in convicting the accused—*Alimuddin v. Queen-Empress*, I. L. R. 23 Cal. 361.

**Section 167.**—(a). The formality of calling upon an accused person to enter on his defence under the provisions of sec. 289 of the Criminal Procedure Code is not a mere formality, but an essential part of a criminal trial. Omission to do so occasions a failure of justice, and is not cured by sec. 537 of the Code. To allow the jury to pronounce their verdict before the accused is called upon to enter on his defence is a misdirection, though the Judge omits to charge the jury at all—*Queen-Empress v. Imam Ali Khan alias Nathu Khan*, I. L. R. 23 Cal. 252.

(b). 1. The words 'in any case' used in this section apply to criminal trials by jury.

2. When part of the evidence, which has been allowed to go to the jury, is found to be irrelevant and inadmissible, it is open to the High Court in appeal, either to uphold the verdict upon the remaining evidence on the record under this section, or to quash the verdict and order a retrial—*Queen-Empress v. Ramchundra Govind Harshe*, I. L. R. 19 Bom. 749.

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E. A. S.

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